Supreme Court of the United States

OCTOBER TERM, 1963

No. 558

NATIONAL LABOR RELATIONS BOARD,
PETITIONER

vs.

JOHN BROWN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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[fol. 1]

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 7089

NATIONAL LABOR RELATIONS BOARD, PETITIONER

vs.

JOHN BROWN, IRVIN L. GOSSETT AND J. C. WEST, JR., doing business as BROWN FOOD STORE, TOOTIE SCHNAUBERT, doing business as CASHWAY FOOD STORE, SAFEWAY FOOD STORE, INC. and ARNOLD CRABB, doing business as THRIFTY WAY FOOD STORE, RESPONDENTS

PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.—filed July 25, 1962

To the Honorable, the Judges of the United States Court of Appeals for the Tenth Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Secs. 151, et seq., as amended by 73 Stat. 519), hereinafter called the Act, respectfully petitions this Court for the enforcement of its Order against Respondents, the officers, agents, successors and assigns of each. Case Nos. 28-CA-626, 28-CA-627, 28-CA-629-1-2, 28-CA-630 and 28-CA-640.

In support of this petition the Board respectfully shows:

(1) Respondents are engaged in business in the State of New Mexico, within this judicial circuit where the unfair labor practices occurred. This Court therefore has jurisdiction of this petition by virtue of Section 10 (e) of the National Labor Relations Act, as amended.

[fol. 2] (2) Upon due proceedings had before the Board in said matter, the Board on May 4, 1962, duly stated

its findings of fact and conclusions of law, and issued an Order directed to the Respondents, the officers, agents, successors and assigns of each. On the same date, the Board's Decision and Order was served upon Respondents by sending copies thereof postpaid, bearing Government frank, by registered mail, to Respondents' counsel.

(3) Pursuant to Section 10 (e) of the National Labor Relations Act, as amended, the Board is certifying and filing with this Court a transcript of the entire record of the proceeding before the Board upon which the said Order was entered, which transcript includes the pleadings, testimony and evidence, findings of fact, conclusions of law, and the Order of the Board sought to be enforced.

Wherefore, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcript to be served upon Respondents and that this Court take jurisdiction of the proceeding and of the questions determined therein and make and enter upon the pleadings, testimony and evidence, and the proceeding set forth in the transcript and upon the Order made thereupon a decree enforcing in whole said order of the Board, and requiring Respondents, the officers, agents, successors and assigns of each to comply therewith.

MARCEL MALLET-PREVOST
Assistant General Counsel
National Labor Relations
Board

Dated at Washington, D. C. this 16th day of July, 1962.

IN UNITED STATES COURT OF APPEALS

ANSWER TO PETITIONER'S PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.— filed September 14, 1962

To the Honorable, the Judges of the United States Court of Appeals for the Tenth Circuit:

[fol. 3] For answer to the Petition of the Petitioner in the above-entitled cause, Brown Food Store, et al, Respondents above named, would respectfully show the Court:

I.

Respondents admit that the United States Court of Appeals for the Tenth Circuit has jurisdiction of this cause by virtue of Sec. 10(e) of the National Labor Relations Act, as amended.

II.

Respondents deny that an Order of Enforcement should be issued by the Court, and take exception to all findings of fact and conclusions of law as stated in the Order of the National Labor Relations Board dated May 4, 1962.

III.

Respondents admit, as alleged in Petitioner's paragraph (2), receipt of the Board's Decision and Order.

Wherefore, the Respondents pray this Honorable Court that it cause notice of the filing of this Answer to be served upon the Petitioner, and that this Court take jurisdiction of the proceedings of said cause, and upon final hearing hereon that this Court enter its Judgment and Order Denying the enforcement of said Order dated May 4, 1962, and for such other relief as may be proper in the premises.

Respectfully submitted,

CLARK, REED & CLARK
By ROBERT L. CLARK
Attorneys for Respondents

* * * *

[fol. 4]

BEFORE THE NATIONAL LABOR RELATIONS BOARD
SIXTEENTH REGION

JOHN BROWN, IRVIN L. GOSSETT AND J. C. WEST, JR., d/b/a BROWN FOOD STORE Case No. 28-CA-626

TOOTIE SCHNAUBERT d/b/a CASHWAY FOOD STORE Case No. 28-CA-627

SAFEWAY FOOD STORE, INC. Case No. 28-CA-629-1-2

ARNOLD CRABB d/b/a THRIFTY WAY FOOD STORE Case No. 28-CA-630

FOOD JET, INC. Case No. 28-CA-640

LENN JONES, AGENT OF MULTI-EMPLOYER BARGAINING ASSOCIATION and RETAIL CLERKS INTERNATIONAL ASSOCIATION, LOCAL 462

INTERMEDIATE REPORT AND RECOMMENDED ORDER.—
August 23, 1960

Statement of the Case

This matter was tried before me in Carlsbad, New Mexico on June 21 and 22, 1960 upon the complaint of the General Counsel based upon charges duly filed by Retail Clerks International Association, Local 462, herein the Union, alleging that John Brown, Irvin L. Gossett and J. C. West, Jr., d/b/a Brown Food Store, herein Respondent Brown, Tootie Schnaubert d/b/a Cashway Food Stores, herein Respondent Cashway, Safeway Food Store, Inc., herein Respondent Safeway, Arnold Crabb, d/b/a Thrifty Way Food Store, herein Respondent Thrifty,

Food Jet Inc., herein Respondent Food Jet and Lenn Jones, agent of a multi-employer bargaining association, herein Respondent Jones, jointly and severally had engaged in and are engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(1), (3) and (5) of the National Labor Relations Act, as amended, 61 Stat. 136, herein the Act.

In essence, complaint is made that the Respondents locked out the employees listed in Appendix A attached hereto on March 16, 1960 and thereafter failed promptly to reinstate certain of them. It is further alleged as explicated at the hearing that Respondent Cashway by [fol. 5] granting merit increases to employees failed in its obligation to bargain with the Union.

Briefs have been received from counsel. Upon the entire record in the case and from my observations of the witnesses, I make the following:

Findings of Fact

I. The business of the Respondents

Each of the Respondents operates a retail food market or markets in Carlsbad, New Mexico, and each, during the 12-month period preceding the issuance of the complaint, did a gross business in excess of $500,000. Each, during the period mentioned, received shipments from points outside the State of New Mexico in amounts exceeding $50,000. I find that the business of each Respondent is in and affects commerce within the meaning of Section 2(6) and (7) of the Act.

II. The organization involved

The Union is a labor organization admitting to membership employees of each Respondent and for a substantial period of time prior to the events about to be related was and now is the exclusive bargaining representative of all employees other than meat department employees of the Respondents in a single unit encompassing all such employees.

III. The unfair labor practices

After the expiration of a bargaining agreement running between the Union and the Respondents, negotiations looking toward a new contract began in January, 1960. Respondent Jones was the authorized spokesman for all Respondents. On March 2 the Union advised the Respondents that a strike vote had been taken and a strike authorized. The Respondents told the Union of this occasion that they would consider a strike against any of them to be a strike against all.[1] On the morning of March 16 the Union established pickets at the entrances [fol. 6] to Respondent Food Jet carrying signs reading, "On Strike, Local 462 Retail Clerks." None of the employees of Food Jet in the bargaining unit reported for work. In consequence the employees in the bargaining unit represented by the Union at all of the Respondents were locked out and remained so until the strike was settled on April 22. Assertedly, because of a belief that three assistant managers, Walter Titus, Tony Lawson and Milton Moore were supervisory employees without the coverage of the bargaining unit, Respondent Thrifty Way permitted them to work through March 17. Upon advice that these three were considered to be in the unit they were then locked out and not again permitted to work until the end of the strike.

The evidence is convincing and not seriously controverted that the Respondents were determined to combat the attempt of the Union "to pick them off one at a time" by regarding the strike against Food Jet as a strike against all. It is asserted that the Respondents were thus taking defensive action to preserve their bargaining position and that their conduct under the holding in Buffalo Linen[2] is not unlawful.

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[1] Upon agreement of counsel, page 107 of the transcript is corrected by inserting following the word "that" on line 17 the following: "they would consider a strike against any of them to be a strike against all of them."

[2] Buffalo Linen Supply Company, etc., 109 NLRB 447. Enforced as N.L.R.B. v. Truckdrivers Local 449 (Buffalo Linen Supply Co.) 353 U.S. 87.

In the cited case, the Board held that a strike against one of the employers in a multi-employer unit was an exertion of economic pressure "to atomize the employer solidarity which is the fundamental aim of the multi-employer bargaining relationship." Thus, the Board reasoned, the action of the nonstruck employers in shutting their plants was "defensive and privileged in nature rather than retaliatory and unlawful." Approving the Board's holding, the Supreme Court said, "in the circumstances of this case the Board correctly balanced the conflicting interests in deciding that a temporary lockout to preserve the multi-employer bargaining basis from the disintegration threatened by the Union's strike action was lawful."

Explication of the status of the locked out employees is to be found neither in the decision of the Board nor in the opinion of the Supreme Court. They appear to have remained employees for emphasis is placed upon the fact that the shutdowns occasioning the lockouts were temporary. All employees were returned to their jobs. Although no such finding is made by the Board or the Court the rationale of the decision seems to rest in part upon [fol. 7] the assumption that when the employees of one employer struck, the employees of the other employers in the unit also became strikers and that the lockout did no more than recognize this to be a fact.

Coming back to the case at hand, each of the Respondents attempted to lessen the economic effect of the lockout by operating its market.[3] Respondent Food Jet, being faced with an economic strike, was wholly free to hire replacements on any basis it found expedient. The other Respondents hired employees on a temporary basis, transferred personnel from other operations, and used kin of managers or supervisors in order to keep their businesses open. The General Counsel contends that Buffalo Linen permits nothing beyond a shutdown following a lockout; that an attempt by an employer to operate in such circumstances is unlawful. An obvious, but not necessarily dispositive, answer to this contention is that

[3] Safeway closed one of its Carlsbad markets and operated the other during the lockout period.

if the employers have a right to lockout they should not be forced to accept a penalty of lost custom for exercising it. But the law is settled that a struck employer (and here I am treating the locked out employees as strikers) may not replace a striker, even temporarily, if the striker is offering unconditionally to return to work. Here the locked out employees had presented themselves to their employers ready to work and had been turned away. Having refused the offer of these employees to work, may the employers give the work, even temporarily, to others?

In Buffalo Linen the Supreme Court saw the problem of the defensive lockout as one involving "the balancing of the conflicting legitimate interests" of the employers in preserving their bargaining association and of the employees in exercising their right to strike. The Court thus has equated a "legitimate" interest with a protected one. That the Court intended this holding as a generalization is to be doubted. It seems unlikely that an employer in preservation of his "legitimate" interest in maintaining a wage scale could lawfully lock out his employees even upon a well founded belief that they would strike at a time unpropitious to the employer to obtain more.

It is clear that a lockout to counteract the exertion of economic pressure by a Union designed to "atomize" employer solidarity is lawful if it serves to bring about a balance of "conflicting interests". The lockout here, I am convinced and find, satisfies that criterion. But a [fol. 8] lockout is still a discrimination affecting tenure of employment and necessarily discourages membership in a labor organization. The purpose of a labor organization, in part at least, is to strengthen the bargaining position of employees by presenting a united front to an employer backed by the right to strike. If strike action cannot be taken within an area and at a time considered most favorable to the interest of the employees the value of the labor organization is diminished and the attraction of membership lessened. But such discrimination is not unlawful, Buffalo Linen holds, if it does no more than bring about a balance of "conflicting interests."

Applying the rationale of Buffalo Linen to the facts of this case, the lockout by the Respondents other than Food

Jet brought about such a balance and was not unlawful. But the Respondents continued their operations as the employers complained of in Buffalo Linen did not. The strike against Food Jet was designed to deprive Food Jet of trade and to force Food Jet and the other Respondents to accept the bargaining demands of the Union. The countering lockout deprived the locked out employees of earnings and lessened their ability to hold out for the terms desired by the Union. Thus the "balance" envisoned by the Supreme Court in the cited case was struck. Was it disturbed by the action of the Respondents in continuing to operate? I think clearly that it was. By keeping their business establishments open, the Respondents were enabled to make earnings or at least to minimize losses and thus were better positioned to withstand the strike that the Union had begun and more firmly to adhere to the bargaining position that they had taken. As the balance spoken of in Buffalo Linen was lost by the added weight thrown into the pan by the Respondents thus was lost, I find their immunity from the Act's prohibitions against discrimination. Because the Respondents, other than Food Jet, continued to operate during the period of the lockout, I find that they discriminated in regard to the hire and tenure of employment of their locked out employees to discourage membership in the Union and that the Respondent employers, other than Food Jet, thus violated Section 8(a)(1) and (3) of the Act.

In accordance with past practice, Respondent Cashway in February 1960, gave two of its employees merit increases. Cashway had routinely taken such action in respect to its employees on a number of occasions over the years and had never been requested to bargain with the Union about it. The complaint alleges that the Respondents thus refused to bargain with the Union. Merit increases are a subject for mandatory bargaining and the [fol. 9] cases so holding are numerous. All that have come to my attention, however, invoive a request for bargaining on the part of a union and a denial that such matters are within the scope of bargaining on the part of the employer. Here, Cashway was following a practice

of years standing without notice that objection on the part of the Union existed. I do not understand that Cashway has ever refused to bargain about merit increases. I find that no violation of the Act is presented in the circumstances.

Because of my disposition of the central question raised by the complaint there is no need to consider whethey any Respondent was remiss in returning the locked out employees to work after the strike settlement. All Respondents[4] other than Food Jet will be required to make the locked out employees whole for loss of earnings for the period each employee was thus prevented from working

I find that Food Jet has not violated the Act in any particular. As a struck employer it was of course free to continue operations as best it could. I do not find evidence to establish that Food Jet combined with the other Respondents to continue operations after locking out employees and thus perhaps to have participated in the commission of the unfair labor practice found above. It seems probable that in the nature of things the agreement among the Respondents did not go beyond an undertaking to lockout in the event one of them was *stuck*. There is no evidence of cooperation among them in manning the stores where the lockouts took place. I will recommend the dismissal of the complaint as to Food Jet.

The only unfair labor practice found is that connected with continued operations while employees were locked out. Respondent Jones participated in this, I find, only as an employee of Respondent Safeway. I find no unfair labor practice to have been committed by Respondent Jones as an individual and will recommend the dismissal of the complaint as to him.

IV. The effect of the unfair labor practices upon commerce

The activities of the Respondents set forth in Section III above occurring in connection with their operations

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[4] This includes Respondent Safeway only in respect to its store #62. I find no violation in connection with its other Carlsbad market, #43, which did not operate during the lockout period.

[fol. 10] described in Section I have a close, intimate and substantial relation to trade, traffic and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The remedy

Having found that the Respondents other than Food Jet and Jones have engaged in unfair labor practices it will be recommended that they cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that certain Respondents have discriminatorily locked out employees it will be recommended that each such Respondent make its employees who were the subject of this discrimination whole for any loss of earnings suffered during the period of the lockout by a payment to each of a sum of money equal to that which each would have earned for the period that the market, in which he was prevented from working, operated on and after March 16, 1960, to the date when he was brought back to work. Loss of pay shall be computed on a quarterly basis in the manner set forth in F. W. Woolworth [5] with a deduction for net earnings during that period. As all of the locked out employees have been reinstated to their jobs and as there is no allegation that any employee was discriminatorily given a different job upon his return, no requirement of reinstatement will be made.[6]

Upon the basis of the foregoing findings of fact and upon the entire record in the case, I make the following:

Conclusions of Law

1. The Union is a labor organization within the meaning of Section 2(5) of the Act.

2. By locking out employees the Respondents other than Food Jet and Jones have discouraged membership

[5] F. W. Woolworth, 90 NLRB 289.

[6] Evidence was taken showing that 2 employees were returned to jobs somewhat different from those held before the lockout but this was in support of the General Counsel's theory of a discriminatory lockout only.

in the Union and have engaged in and are engaging in unfair labor practices within the meaning of Section 8 (a) (3) of the Act.

[fol. 11] 3. By the lockout the Respondents other than Food Jet and Jones have interfered with, restrained and coerced employees in the exercise of rights guaranteed in Section 7 of the Act and have thereby engaged in and are engaging in unfair labor practices within the meaning of Section 8(a) (1) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

5. The evidence does not establish any violation of the Act in respect to Food Jet or Jones.

Recommendations

Upon the basis of the foregoing findings of fact and conclusions of law and upon the entire record in the case, I recommend that John Brown, Irvin L. Gossett and J. C. West, Jr., doing business as Brown Food Store, Tootie Schnaubert, doing business as Cashway Food Store, Safeway Food Store, Inc. and Arnold Crabb, doing business as Thrifty Way Food Store, all of Carlsbad, New Mexico, the officers, agents, successors and assigns of each shall:

1. Cease and desist from:

(a) Discouraging membership in the Union by locking out their employees to improve their bargaining position while continuing to operate their establishments;

(b) In any like or similar manner interfering with, restraining or coercing their employees in the exercise of the right to self-organization, to form, join, or assist Retail Clerks International Association, Local 462, or any other labor organization, to bargain collectively through representatives of their own choosing and to engage in other concerted activity for the purpose of collective bargaining or other mutual aid or protection or to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring

membership in a labor organization as a condition of employment as authorized in Section 8(a)(3) of the Act.

2. Take the following affirmative action which I find will effectuate the policies of the Act:

[fol. 12] (a) Each respondent shall make whole its employees who were prevented from working for it for the period of operations during the lockout in the manner set forth in the section of the report entitled "The remedy";

(b) Make available to the Board or its agents upon reasonable request all payroll records, social security records, attendance records and reports and all other such data convenient for a calculation of the amount of back pay due under the terms of this recommendation;

(c) Each said Respondent shall post at its establishment in Carlsbad, New Mexico, copies of the appropriate notice attached hereto as an appendix. Copies of said notice to be furnished by the Regional Director for the Sixteenth *Regional* shall, after being duly signed by authorized representatives be posted immediately upon receipt thereof and maintained for sixty (60) consecutive days thereafter in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that said notices are not altered, defaced or covered by any other materials;

(d) Each shall notify the Regional Director for the Sixteenth Regional in writing within twenty (20) days from the date of this Intermediate Report and Recommended Order what steps it has taken in compliance.

It is further recommended that unless on or before twenty (20) days from the date of receipt of this Intermediate Report and Recommended Order each of the Respondents notifies the said Regional Director in writing that it will comply with the foregoing recommendations, the National Labor Relations Board issue an order requiring such Respondent to take that action.

Dated: August 23, 1960.

WALLACE E. ROYSTER
Trial Examiner

Appendix A to Intermediate Report and Recommended Order

[fol. 13]

Brown Food Store:

Juanita Blanchard
Lupe Biscaine
Jerry Brooks
Bernice Turnbow

Food Jet:

Manuel Biscaino
Margerite Bridges
Joe Briones
Larry Brodie
N. G. Deanda
Marjorie Hoyt
Ray Starment

Cashway Food Store:

Bobby Barrs
Charles Blackburn
J. H. Carbell
Dwayne Compton
Jo Nell Cox
Charles Davis
Beverly Fletcher
Julian Fletcher
Charles Healer
Bobby Johnson
Alfredo Lira
Jesus Lira
Janie Miller
Wayne Madrall
O. J. Smith
Weldon Stafford
Dorothy Titus
Gary Watkins

Thrifty Way Food Store:

Addie Black
Belle Coalson
Robert Cummings
Wayne Davis
Allene Eggleston
Thomas Lawson
Terrell McBee
Militon Moore
Vonda Narramore
Roy Navarrette
John Pirtle
Doug Pryor
Eddie Razo
Herschell Skaggs
Walter Titus
Joe Vasquez
Mike Wiley

Safeway Food Store, Inc.

Store #62	*Store #43*
Ronald Bartholomew	Leo Blackburn
Ray Bradshaw	Reuben Carrasco
Harold G. Cannon	Virgie Hartley
Kenneth Chapman	Tom Hernandez
Juanita Durham	John Julianna
Grady Enger	Tony Matta
Vance Garner	Wanda McClary
Robert Hamblin	Timo Navarrette
Johnny Kimberling	Carl Smith
Raymond Methola	Jim Wilson
Mary Payte	
Dale Peden	
Glen Pike	
Lorene Sanders	
Allan Shahan	
David Tuttle	

[fol. 14]

APPENDIX

Notice To All Employees

Pursuant To The Recommendations Of A Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

We Will make whole the employees locked out during the period on and after March 16, 1960 and until they were reinstated for any loss of pay suffered at a time when this market was open for business. The employees to be made whole are: Juanita Blanchard, Lupe Biscaine, Jerry Brooks and Bernice Turnbow.

We Will Not by means of unlawful lockout or in any like or similar manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization to form labor organizations, to join, or assist Retail Clerks International Association, Local 462 or any other labor organization, to bargain collectively through repre-

sentatives of their own choosing and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection or to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3) of the Act.

JOHN BROWN, IRVIN L. GOSSETT and J. C. WEST, JR., d/b/a Brown Food Store
(Employer)

Dated..... By.....
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

APPENDIX

Notice To All Employees

[fol. 15] Pursuant To The Recommendations Of A Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, I hereby notify my employees that:

I Will make whole the employees locked our during the period on and after March 16, 1960 and until they were reinstated for any loss of pay suffered at a time when this market was open for business. The employees to be made whole are: Bobby Barrs, Charles Blackburn, J. H. Carbell, Dwayne Compton, Jo Nell Cox, Charles Davis, Beverly Fletcher, Julian Fletcher, Charles Healer, Bobby Johnson, Alfredo Lira, Jesus Lira, Janie Miller, Wayne Madrall, O. J. Smith, Weldon Stafford, Dorothy Titus and Gary Watkins.

I Will Not by means of unlawful lockout or in any like or similar manner interfere with, restrain, or coerce my employees in the exercise of their right to self-organization to form labor organizations, to join, or assist Retail Clerks International Association, Local 462 or any other labor organization to bargain collectively through representatives of their own choosing and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection or to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3) of the Act.

TOOTIE SCHNAUBERT d/b/a
Cashway Food Store
(Employer)

Dated..... By.....
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

APPENDIX

Notice To All Employees

[fol. 16] Pursuant To The Recommendations Of A Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

We Will make whole the employees locked out during the period on and after March 16, 1960 and until they were reinstated for any loss of pay suffered at a time when this market was open for business. The employees to be made whole are: Ronald Bartholomew, Ray Brad-

shaw, Harold G. Cannon, Kenneth Chapman, Juanita Durham, Grady Enger, Vance Garner, Robert Hamblin, Johnny Kimberling, Raymond Methola, Mary Payte, Dale Peden, Glen Pike, Lorene Sanders, Allan Shahan and David Tuttle.

We Will Not by means of unlawful lockout or in any like or similar manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization to form labor organizations, to join or assist Retail Clerks International Association, Local 462 or any other labor organization to bargain collectively through representatives of their own choosing and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection or to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3) of the Act.

Safeway Food Store, Inc., Store #62
(Employer)

Dated..... By.....
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

APPENDIX

Notice To All Employees

Pursuant To The Recommendations Of A Trial Examiner of the National Labor Relations Board, and in order [fol. 17] to effectuate the policies of the National Labor Relations Act, I hereby notify my employees that:

I will make whole the employees locked out during the period on and after March 16, 1960 and until they were reinstated for any loss of pay suffered at a time when this market was open for business. The employees to be made whole are: Addie Black, Belle Coalson, Robert Cummings, Wayne Davis, Allene Eggleston, Thomas Lawson, Terrell McBee, Milton Moore, Vonda Narramore, Roy Navarrette, John Pirtle, Doug Pryor, Eddie Razo, Herschell Skaggs, Walter Titus, Joe Vasquez and Mike Wiley.

I Will Not by means of unlawful lockout or in any like or similar manner interfere with, restrain, or coerce my employees in the exercise of their right to self-organization to form labor organizations, to join or assist Retail Clerks International Association, Local 462, or any other labor organization to bargain collectively through representatives of their own choosing and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection or to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3) of the Act.

ARNOLD CRABB d/b/a Thrifty Way Food Store
(Employer)

Dated..... By.....
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

BEFORE THE NATIONAL LABOR RELATIONS BOARD

RESPONDENT EMPLOYERS' EXCEPTIONS TO INTERMEDIATE REPORT AND RECOMMENDED ORDER— September 29, 1960

Respondent employers John Brown, Irvin L. Gossett and J. C. West, Jr., d/b/a Brown Food Store; Tootie Schnaubert d/b/a Cashway Food Store; Safeway Food [fol. 18] Store, Inc.; and Arnold Crabb d/b/a Thrifty Way Food Store, hereby file their exceptions to the Intermediate Report and Recommended Order of Trial Examiner Wallace E. Royster, dated August 23, 1960, at Washington, D.C., as follows:

(1) To the Trial Examiner's finding that "Here the locked out employees had presented themselves to their employers ready to work and had been turned away" (I.R. p. 3, lines 33-34), for the reason that the record evidence fails to support the finding that all employees in the multi-employer bargaining unit reported to work on the day of the strike prior to the lockout.

(2) To the Trial Examiner's finding and conclusion that "Because the Respondents, other than Food Jet, continued to operate during the period of the lockout . . . that they discriminated in regard to the hire and tenure of employment of their locked out employees to discourage membership in the Union and that Respondent employers, other than Food Jet, thus violated Section 8(a)(1) and (3) of the Act" (I.R. p. 4, lines 23-28), for the reason that such finding and conclusion is contrary to, and unsupported by, the record facts and the law.

(3) To the Trial Examiner's finding and conclusion that "The activities of Respondents set forth in Section III (of the Intermediate Report) . . . tend to lead to labor disputes burdening and obstructing commerce" (I.R. p. 5, lines 15-19), for the reason that such finding and conclusion is unsupported in fact and in law.

(4) To the Trial Examiner's recommended order that Respondents make the "employees who were subject to this discrimination whole for any loss of earnings suffered

during the period of the lockout. . . ." (I.R. p. 5, lines 28-34), for the reason that such finding and conclusion that Respondents discriminatorily locked out their employees and that such employees, as a result thereof, are entitled to back pay is unsupported in fact and in law.

(5) To the Trial Examiner's finding and conclusion that "By locking out employees the Respondents other than Food Jet and Jones have discouraged membership in the Union and have engaged in and are engaging in unfair labor practices within the meaning of Section 8(a)(3) of the Act (I.R. p. 5, lines 49-52), for the reason that such finding and conclusion is unsupported in fact and in law.

[fol. 19] (6) To the Trial Examiner's finding and conclusion that "By the lockout the Respondents other than Food Jet and Jones have interfered with, restrained and coerced employees in the exercise of rights guaranteed in Section 7 of the Act and have thereby engaged in and are engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act (I.R. p. 6, lines 1-5), for the reason that such finding and conclusion is unsupported in fact and in law.

(7) To the Trial Examiner's finding and conclusion that "The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act (I.R. p. 6, lines 7-8), for the reason that such finding and conclusion are unsupported in fact and in law.

(8) To the cease and desist provisions of the Trial Examiner's Recommended Order (I.R. p. 6, lines 24-39), for the reason that the record facts and the law fail to sustain the unfair labor practice findings and conclusions which are the basis for such recommendations.

(9) To the affirmative action provisions of the Trial Examiner's Recommended Order (I.R. p. 6, lines 40-61; p. 6, lines 1-3), for the reason the record facts and the law fail to sustain the unfair labor practice findings and conclusions which are the basis for such recommended affirmative action.

Respondents respectfully request that upon consideration of the foregoing Exceptions that the Board set aside the

Trial Examiner's unfair labor practice findings, conclusions, and recommendations and dismiss the complaints herein in their entirety.

CLARK, REED & CLARK

By WILLIAM L. KELLER
Attorneys for Respondent Employers

Dated at Dallas, Texas this 29th day of September, 1960

[fol. 20] BEFORE THE NATIONAL LABOR RELATIONS BOARD

DECISION AND ORDER—May 4, 1962

On August 23, 1960, Trial Examiner Wallace E. Royster issued his Intermediate Report in the above-entitled consolidated proceeding, finding that the Respondents, with the exception of Food Jet, Inc., and the individual Respondent, Lenn Jones, had engaged in, and were engaging in, certain unfair labor practices and recommending that they cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Respondents, except for the two mentioned above, filed exceptions to the Intermediate Report together with a supporting brief.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions, the brief and the entire record in the cases, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner for the reasons stated below.

Each of the Respondents operates one or more retail food stores in Carlsbad, New Mexico. They have been bargaining on a multiemployer association basis with the

Union since 1957 and have had a series of collective-bargaining contracts since that time.[1] In January 1960, the employer Association and the Union opened negotiations for a new contract, and by March 2 they had agreed on all terms except the Union's proposal for retroactive wage increases and the effective date for such increases. On March 2, the Union authorized a strike to implement these demands and notified the Association of this decision. The Association thereupon advised the Union that the employers would consider a strike against any member of the group to be a strike against all.

On March 16, the Union struck and picketed Food Jet, one of the five Association members involved here. The other four employers, operating six stores, immediately locked out all of their employees, telling them that they would be returned to work at the conclusion of the strike. Each Respondent thereafter individually attempted to continue operating. Food Jet obtained replacements for its striking employees. The other four employers functioned with the assistance of supervisory personnel, rela- [fol. 21] tives of management, and new employees hired on a temporary basis.[2] Thus, none of the Respondents who locked out its employees in fact closed down during the period of the lockout.

During this period the parties continued their negotiations, and on April 22, they reached a final agreement. Accordingly, the strike and lockouts were terminated and the employers immediately recalled all their employees. Throughout the strike and lockout the Respondents continued in effect all employee benefits in behalf of their regular employees.

The Trial Examiner found that the initial lockout by the nonstruck employers was a permissible defensive

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[1] The relationship between the contracting parties has always been an amicable one, and their contracts have contained union shop provisions.

[2] Each of these employers hired temporary replacements who were told at the time of hiring that their employment was only for the duration of the strike. Several of the chain stores also brought in supervisors and clerks from other stores in outlying areas.

measure to protect the solidarity of the multiemployer unit under the rule of Buffalo Linen Supply Company.[3] However, he reasoned that the additional action of those employers in continuing to operate their businesses during the lockout had upset the delicate balancing of interests struck in the Buffalo Linen case and hence was not privileged under that decision. He therefore concluded that by continuing to operate during the peroid of the lockout, the nonstruck employers discriminated in regard to the hire and tenure of employment of their locked-out employees to discourage membership in the Union in violation of Section 8(a)(3) and (1) of the Act and that the lockout was thereby rendered unlawful. We agree with the Trial Examiner's conclusion that the nonstruck employers violated the Act by locking out their employees in the circumstances involved here.

The Buffalo Linen case involved a whipsaw situation where nonstruck members of a multiemployer association unit temporarily shut down operations when a union struck an employer member of the association to implement bargaining demands in the multiemployer unit. Departing from a long line of its own precedents, the Board there held in effect that the resulting lockout was a legitimate defensive means of protecting the integrity of the multiemployer bargaining unit against the disintegration threatened by the whipsaw strike. The Supreme Court, in affirming the Board's decision, observed that the "ultimate problem is the balancing of the conflicting [fol. 22] legitimate interests [of "employees and employers"] and that the "difficult and delicate responsibility" for striking that balance was committed primarily to the Board.

While the present case has its similarity to the Buffalo Linen situation, there is a critical difference between the two cases. The underlying rationale of Buffalo Linen was that a shutdown was deemed appropriate to preserve the established unit, and that the lockout incidental to such shutdown was not unlawful. In the instant case, however, there was no shutdown to protect a bargaining unit, for

[3] N.L.R.B. v. Truckdrivers Local 449 (Buffalo Linen Supply Company), 353 U. S. 87, affirming 109 NLRB 447.

Respondents continued to operate by hiring replacements after locking out their employees. Therefore, whatever defensive validity there may be for shutting down in a whipsaw context, such consideration is inapposite where, as here, the employers do not shut down. A lockout, needless to say, is a drastic form of discrimination and its use in the present case far exceeds the justification for the otherwise discriminatory measure endorsed in Buffalo Linen. That the nonstruck Respondents, in replacing their employees, may have acted in self-interest rather than specifically to discourage union membership, or the Union's strike at Food Jet, does not negate their unlawful intent. The Supreme Court in its recent Local 357 [4] opinion thus took the occasion to reiterate its holding in Radio Officers [5] that "[s]ome conduct may by its very nature contain the implications of the required intent [where] the natural foreseeable consequences of [the] actions . . . warrant the inference." Cf. Gaynor News Co., Inc. v. N.L.R.B., 347 U.S. 17, 37; Republic Aviation Corp. v. N.L.R.B., 324 U.S. 793, 795.

We conclude, in balancing the conflicting interests of the employees and the Respondents under the particular circumstances of this case, that the nonstruck Respondents were not justified in replacing their employees because of a strike called by the Union against Respondent Food Jet. Locking out employees in order to replace them with other workers may hardly be viewed as equivalent to the defensive action of a shutdown to preserve the solidarity of the Association unit. On the contrary, since the Respondents were continuing to operate and since no reason appears why they could not have continued to operate [fol. 23] with their own employees during the strike, this constitutes a temporary replacement of employees solely because they were engaging in protected concerted activity, i.e., striking against Food Jet.

With all respect, we think our dissenting brethren, in equating Food Jet's right to replace strikers with the asserted right of Respondents to operate with replace-

[4] Local 357, Teamsters Union v. N.L.R.B., 365 U.S. 667, 675-676.

[5] Radio Officers Union v. N.L.R.B., 347 U.S. 17, 45.

ments during the lockout, are overlooking a significant difference in the respective positions of Food Jet and Respondents, and are also overlooking the basic considerations which give rise to the right to lockout. It must be remembered that the statutory protection accorded to strikers is diminished under the Mackay case,[6] to the extent that an employer is free to replace economic strikers, and that the reason for this impairment or diminution of the protection is the need to accommodate the employer's legitimate conflicting interest in maintaining production. As applied to this case, Food Jet is free to operate with replacements, because only by hiring such replacements can it operate at all; its regular employees are unwilling to work at its terms. But the other members of the employer unit are not required to resort to replacements; their regular employees are willing to work at the employers' terms.

It is, of course, true that under Buffalo Linen, Respondents are not required to operate and await a whipsawing strike. That case, like Mackay, permits an abridgement or diminution of the statutory protection, and holds that where a union strikes one member of a bargaining unit as part of a whipsawing operation, the other members for the purpose of protecting the bargaining unit may lawfully shutdown and lockout the employees. The purpose of this exception to the rule against lockouts for union activity is to prevent unfair advantage being taken of the members of an employer unit. If the union could successfully strike one at a time, the other members of the employer unit would in ordinary circumstances continue operating to the severe economic damage of the struck member, and each in turn could be driven to the wall in the "whipsaw." For this reason, if one member is shut down by a strike, the others may also shutdown, but they are not required to do so. If the struck member operates through replacements, no economic necessity exists for the other members shutting down. If in those circumstances they resort to a lockout and hire replacements, it may be *reasonable* inferred that [fol. 24] they do so not to protect the integrity of the em-

[6] N.L.R.B. v. Mackay Radio & Tel. Co., 304 U.S. 333.

ployer unit, but for the purpose of inhibiting a lawful strike. In short, the lockout in these circumstances ceases to be "defensive" and becomes "retaliatory." Buffalo Linen, 109 NLRB at 448, quoted at 353 U.S. at 91.

We find, therefore, that the Respondents, other than Food Jet, interfered with, restrained and coerced employees in the exercise of their right to bargain collectively and to strike in furtherance of economic demands, and violated Section 8(a)(1) of the Act by replacing them while they were still willing to work and were not on strike. We also find that such conduct constituted unlawful discrimination within the meaning of Section 8(a)(3) of the Act, in discouraging employees from supporting the Union and from engaging in concerted activities for mutual aid and protection.[7]

Order

The Board adopts as its Order the cease and desist and affirmative action Recommendations of the Trial Examiner with the modification of Provision 2(d) to read: "Notify said Regional Director, in writing, within 10 days from the date of this Order what steps the Respondents have taken to comply herewith."[8]

Dated, Washington, D. C. May 4, 1962.

FRANK W. MCCULLOCH, *Chairman*
BOYD LEEDOM, *Member*
GERALD A. BROWN, *Member*
National Labor Relations Board

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[7] See Utah Plumbing and Heating Contractors v. N.L.R.B., 294 F. 2d 165 (C.A. 10); Quaker-State Oil Refining Corp. v. N.L.R.B., 270 F. 2d 40 (C.A. 3), cert. denied, 361 U.S. 917. Compare: Betts Cadillac, Olds, Inc., 96 NLRB 268; International Shoe Company, 93 NLRB 907; Duluth Bottling Association, 48 NLRB 1335.

[8] In the notices attached to the Intermediate Report as Appendices, the words "Decision And Order" are hereby substituted for the words "The Recommendations Of A Trial Examiner." In the event that this Order is enforced by a decree of a United States Court of Appeals, the words "A Decree Of The United States Court Of Appeals, Enforcing An Order" shall be substituted for the words "A Decision And Order."

[fol. 25] MEMBERS RODGERS AND FANNING, DISSENTING:

The majority acknowledges that members of an employer association, faced with the threat of successive whipsaw strikes, may lock out their employees, in accordance with the Supreme Court's explicit holding in Buffalo Linen, supra, but finds they may not thereafter attempt to operate with temporary replacements, even though no unlawful motivation is alleged or shown. We believe this decision is illogical, and not warranted by either the statute or the realities of multiemployer bargaining.

As a matter of statutory interpretation, we do not believe the securing of temporary replacements in this situation can be held to have unlawfully discouraged union membership. Granting that the employers' initial lockout was permissible, as the Supreme Court has held, it seems clear that temporarily replacing the employees for the duration of the strike did not further affect their employment status or union adherence, particularly since the employees in this case were expressly told by Respondents they would have their jobs at the end of the strike.[9] The discrimination, if any, took place at the point of the initial lockout, and the Supreme Court has held this to be privileged in the whipsaw situation. How can the performance of a nondiscriminatory act make unlawful something which was theretofore privileged? [10]

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[9] All employees were retained during the lockout on company records as employees, and continued to receive vacation, insurance, and other company benefits. All were returned to their jobs, and the replacements discharged, at the end of the strike and lockout.

[10] Our colleagues in the majority imply that we have viewed the lockout here, accompanied by temporary replacement of the locked-out employees, as "equivalent" to the "defensive" action of a complete shutdown. On the contrary, we have not made such a characterization one way or the other, because we do not think the question of "equivalence" is relevant. The portion of the statute here involved speaks of discrimination: to find a violation of Section 8(a)(3), some form of discrimination must be found. The only conceivable discriminatory action in the present case, the association-wide lockout has been found privileged by the Supreme Court. To "infer" unlawful discrimination, as does the majority,

[fol. 26] Moreover, the majority appears to overlook the rationale behind the Supreme Court's Buffalo Linen decision. It was therein stated that "the preservation of the integrity of the multiemployer bargaining unit" was sufficient justification for a lockout in the whipsaw situation. Thus, members of an association could require that all employers be struck, if any; partial-unit strikes were subject to being made full-unit strikes by the employer's lockout action. Granting this, it would seem to follow that temporary replacement of the employees in strike status was well within the employers' rights under Mackay.[11] Unlike other possible forms of employer action,[12] temporary replacement is less, not more, than the right of permanent replacement granted in Mackay.

The inequity of the majority's holding becomes evident when contrasted with its holding as to Food Jet, the first employer struck. Food Jet attempted to obtain replacements and is found not to have violated the Act; the other four employers did the same thing, but are found to have acted unlawfully. We can see no justification for thus treating the members of the association differently; in our view, it is not consistent with the Supreme Court's concept of preserving the integrity of the association-wide unit, and unfairly handicaps those employers subject to the threatened whipsaw tactics. They must either

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from the performance of the further act of temporary replacement, which does not in itself discriminate against employees, causes us to suspect that the majority's real quarrel is with the Supreme Court's holding in Buffalo Linen that the discrimination inherent in the original lockout was privileged.

In our view, the Supreme Court's decision in Radio Officers', supra, is not applicable. Where there is discrimination, intent may be inferred, as in Radio Officers', but here there is no discrimination, other than that found privileged by the Supreme Court.

[11] N.L.R.B. v. Mackay Radio & Telegraph Co., 304 U.S. 333, where it was held that any employer could lawfully hire permanent replacements during an economic strike in order to continue his business.

[12] See, e.g., Erie Resistor Corp., 132 NLRB No. 51, where the employer unlawfully granted superseniority to returning strikers and strike replacements.

[fol. 27] wait to be picked off one at a time by the whipsawing Union, or close down completely and cease operating, contrary to their rights under Mackay.

It is misleading to say, as the majority does, that regular employees of the nonstruck members are "willing to work at the employers' terms." These employees are willing only to receive wages while their brethren in the rest of the association-wide unit are exerting whipsaw pressure on one employer to gain benefits that will ultimately accrue to all employees in the association-wide unit, including those here locked out. The choice the majority is giving the nonstruck employers—to ignore the whipsaw or close down completely—renders largely illusory the right of lockout given them by the Supreme Court in Buffalo Linen.

We would reverse the Trial Examiner and dismiss the complaint.

Dated, Washington, D.C. May 4, 1962.

PHILIP RAY RODGERS, *Member*
JOHN H. FANNING, *Member*
National Labor Relations Board

BEFORE THE NATIONAL LABOR RELATIONS BOARD

TRANSCRIPT OF TESTIMONY

Carlsbad, New Mexico Tuesday and Wednesday, June 21 and 22, 1960.

Pursuant to notice, the above-entitled matter came on for hearing at 10 o'clock a.m.

Before: WALLACE E. ROYSTER, *Esq., Trial Examiner*

APPEARANCES: Everett P. Rhea, Esq., General Counsel, appearing for the National Labor Relations Board. William L. Keller, Esq. Clark, Reed & Clark, appearing on behalf of Respondents.

* * *

[fol. 28] ROBERT E. HAMBLEN, a witness called by and on behalf of General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Rhea

* * * *

Q. Now, did you have a conversation with the store manager that morning that this lockout began? A. Yes, sir, I did.

* * * *

Q. What were your working hours at that time? A. Eight to five.

Q. Eight to Five? Did you report for work at the usual time that morning? A. Yes, I did. I went up to the door and I walked in with one of the butcherettes that worked in the market and Mr. Howell met us at the door and said there would be no grocery clerks that morning—just butcher employees.

Q. Did he say anything else? A. No, sir, that's all he said, so I just turned and walked away.

Q. Was there anything said at that time about when you would return to work or anything of that sort? A. No there sure wasn't.

* * * *

Cross Examination by Mr. Keller

Q. Bob, on the morning that the union struck Food Jet and you reported to work at Safeway Stores, didn't Mr. Wayman tell you that there was a strike on, that he couldn't permit you to come to work? A. Yes.

Q. And told you there was a strike on? A. Yes, there was.

Q. Did he tell you that Food Jet had been struck that morning? A. No, he didn't, he didn't tell me which store had been struck.

* * * *

Q. When you returned to work were you denied any benefits under the terms of the contract, I mean, were you reinstated with the *senority* that you had earned under the old contract? A. Yes, sir, I was.

Q. You received all the pay benefits under the new contract? A. Yes, sir.

Q. As far as you know you received every benefit under the terms of the new contract? A. Yes, sir.

* * * *

[fol. 29] Q. When you returned to work following the execution of the contract on April 22, 1960, was there much work to be done around the store? A. Yes, sir, there was quite a bit.

Q. Were the stocks on the shelves fairly well depleted? A. Yes, sir, they were and they wasn't done right either. There was gobs and gobs of 'em that weren't marked underneath on a stack display—instead of marking the cans underneath they just set one marked on top of it, see. It wasn't done right.

Q. In other words, what you're telling us, that the stock in the store was in a pretty bad mess when you returned to work? A. It was, yes, sir.

* * * *

MARY PAYTE, a witness called by and on behalf of General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Rhea

* * * *

Q. Sometime in March—do you know the date in March on which this lockout started? A. March 16th.

Q. March the 16th, and on that date did you go and report for work as you ordinarily do? A. I reported for work at the usual time.

Q. And who was with you? What other employees were with you at that time? A. The other two checkers—female clerks.

Q. Will you give us their names? A. Lorraine Sanders and Juanita Durham.

Q. Did you on that morning have a discussion with the store manager of Safeway? A. We just knocked on the door for him to unlock it and let us in and I asked him if we were locked out and he said yes.

Q. And who is the "he" now? A. Mr. Howell.
Q. Mr. Howell, and that's Store No. 62? A. Yes.

* * * *

Q. All right. Now, when did you next hear from Mr. Howell, if at all, about returning to work? A. It was the next Tuesday morning, the 26th, he called me at home and asked me if I was working and I told him no and he said well, I'd like to talk to you, so I got ready and went down to the store.

Q. And what was that conversation, please? A. Well, he said, "Mary, if you came back to work, do you think [fol. 30] you could show more enthusiasm" and I said, "what do you mean, you don't think I have been doing my job" and he said, "no, I don't". I says, "well, I had an awful lot of stock and being called to the check stand so much, I know I didn't get all my stocking done".

Q. All right, anything else said at that time? A. Well, he says, "we ran this store for the last five weeks with six employees and I think we can now with eleven."

* * * *

Cross Examination by Mr. Keller

* * * *

Q. Do you know whether or not Safeway Stores have enough volume of business immediately following the strike to put all their employees back to work and keep them busy? A. Do you want my personal opinion?

Q. I'm just asking you if you know? I don't want your personal opinion, I'm asking you if you know? A. I'm pretty sure that they did. If they didn't have enough volume to put the regular employees back to work why did they keep these non-union people at the store working?

Q. When you say why did he keep non-union people in the store, now, what non-union people are you talking about? A. He had people from out of town, Safeway people from out of town that he brought here and they worked.

Q. During the strike? A. During the lockout.

* * * *

WALTER TITUS, a witness called by and on behalf of General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Rhea

* * * *

Q. Can you tell us just what the wording was on the picket sign that was put up at Food Jet? A. It said, "on strike".

Q. And did it name the local beneath the letters on strike—beneath the words, "on strike"? A. Yes, it was stamped on there, Local 462.

Q. What was the rest of it? Local 462, Retail Clerks? A. Yes.

Q. And that's all that was on the sign? A. Yes, sir.

Q. Now, the picket sign—was there a picket sign later placed at the Brown Food Store? A. There was a picket sign later, however it stated, "locked out".

Q. Locked out? A. Yes.

[fol. 31] Q. Was the name of the local immediately under that sign? A. Yes, sir.

Q. Was there also a picket sign used at the Cashway Store? A. The same as Brown's.

Q. The same wording as Brown's? A. Yes.

* * * *

Q. Now, when the lockout began on March 16, were you an employee at that time of Thrifty Way? A. Yes, sir.

Q. And did you have any conversation with anyone there in charge with reference to whether you should continue working or not? A. I went to work that morning and Harold Renfro, the manager of Thrifty Way No. 1 told me that we were locked *our* and ourservices would not be needed until further notice was given.

* * * *

Cross Examination by Mr. Keller

Q. Do you know whether or not Mr. Arnold Crab, owner of Thrifty Way Food Stores is a former union member? A. Do I know it, sir?

Q. Do you know it? A. Through hearsay only, sir.

Q. Has he himself ever told you he is a former union member? I think if you'll recall, he has? A. I believe Mr. Crab has told me that he had belonged to a union—the butcher's union, yes, sir, I believe he did.

Q. And I think that Mr. Crab told you personally that he was not against unions or organization of labor in a discussion that you had with him? A. Yes, sir.

Q. Could you tell me, Mr. Titus, when the union actually took a strike vote? A. As to the date, no, sir.

Q. You are president of this local but you don't know when the strike vote was taken? A. No, sir, I do not keep notes of meetings or any papers whatsoever.

Q. Were you present when the strike vote was taken? A. Yes.

Q. Can you tell us whether or not that they voted to strike all of the members of the Multi-Employer Unit? A. They voted to strike.

Q. They voted to strike them all? A. We just voted for a strike.

Q. But you were negotiating with the Multi-Employer Bargaining Unit? A. What?

Q. Negotiations were between the union and the Multi-Employer Bargaining Unit?

MR. RHEA: Do you know what he's talking about, [fol. 32] Mr. Titus? A. Not really.

Q. Bargaining at that time, sessions were being held between the union and the grocery concerns in Carlsbad to bargain as a unit or to bargain together? A. Yes.

Q. Now did they vote to strike all of the members of the bargaining unit or any one of them? A. Like I repeated, we took a strike vote and it passed. We weren't voting to strike all all or one. We just took a strike vote and it carried.

Q. In other words, at that time, there was no knowledge as to whether or not the union would strike any one of them or all of them? A. That is true as far as I know, yes, sir.

Q. And who was going to make that decision? A. Sir, that was left to the discretion to men more qualified and through our discussions and they came up with an answer.

Q. Who were these men? A. I think Mr. Harold Canon, the Secretary and Treasurer and Mr. Carl Canon and whether or not not Mr. Paul Hansen was in on that selecting I do not know, sir.

Q. But the authority to designate which local concern would be struck was delegated to these people? A. It was left to their discretion, yes, sir.

Q. And they could select any of them or all of them? A. Yes, sir.

Q. Do you know whether or not your—any spokesman for the union contracted any of these grocery employers you were bargaining with and tried to get them to sign contracts individually before the strike? A. Yes, sir. A Mr. Carl Canon.

Q. Who did he contact? A. If I am not mistaken, he contacted Arnold Crab and Food Jet.

Q. And tried to get them to sign individual contracts with the union? A. He tried to get them to sign contracts, yes, sir and later went to Your Food Store with the same understanding and the same procedure as these gentlemen and Your Food Store signed the contract.

* * * * *

Q. Could you tell us, Mr. Titus, what the purpose was in contacting Jet Food and Thrifty Way Food Stores and trying to get them to sign separate contracts? A. What, sir?

Q. What the purpose was in trying to get Jet Food and Thrifty Way Food Stores to sign separate contracts? A. The purpose was sir, that we could get contracts signed. That's what we were after.

Q. Would you tell me, Mr. Titus why the decision was reached to picket *Foot* Jet? A. No, sir, I do not know.

Q. You don't know? A. No, sir.

[fol. 33] Q. You never heard it discussed in any union meeting as to why they selected Food Jet to be picketed? A. No, sir.

Q. Would you tell me what the picket sign said that was placed at Food Jet? A. It said "strike" or "on strike"

Q. Local 462? A. Yes, sir.

* * * * *

Q. But you were told it was hoped that the strike would be over soon and that you would return to work? A. Yes, I was told that, sir.

Q. I will ask you one more question, Mr. Titus. Do you know why it was decided not to strike Safeway? A. Do I know, sir? No, sir.

Q. Never heard it discussed? A. No, sir.

Q. You are president of 462? A. Yes.

Q. Which was the striking union? A. Yes, sir.

Q. Yet your testimony here today is that you do not know why it was decided to strike Food Jet and do not know why it was decided not to strike Safeway? A. That's right. I do not know. The reason I do not know is because I've only been in this local union here about eleven months and I had been on a committee that took a strike vote and from my knowledge of such as that was left up to people that had prior years experience.

Q. It was left up to other people that had prior years of experience? A. Yes, sir and Carl Canon and as far as I know there may have been other people from our local union—some of the older members—I don't know. I think . . . (interrupted)

TRIAL EXAMINER: You have answered the question. You said you don't know? A. Yes, sir.

MR. KELLER: That's all.

Redirect Examination by Mr. Rhea

Q. Who was it made the remark to you they hoped the strike would be over soon? A. If I'm not mistaken, Mr. Harold Renfro.

Q. He is the man you have testified to as being in charge of Thrifty Way No. 1? A. Yes, sir.

* * * *

MR. RHEA: It is stipulated by and between the Respondents and General Counsel that the strike picket [fol. 34] sign placed on Food Jet on March 16th; that on March 17th the lockout sign was placed on Cashway and on March 22 the lockout sign was placed on Brown's Food Store.

TRIAL EXAMINER: Subject to correction and verification, I understand that stipulation is accepted and it is noted.

* * * *

ROBERT SCHOBERTH, a witness called by and on behalf of General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examinaiton by Mr. Rhea

Q. State your name, please? A. Robert Schoberth.
Q. You are with the Safeway organization? A. I am the manager of the Carlsbad District of the El Paso Division for Safeway Stores.

* * * *

Q. * * * Let me ask you another thing. Am I properly informed that certain supervisory people transferred from some of your other stores for example like, I think, Ft. Stockton and perhaps another store or so in that area, that worked with you here during the lockout period? A. Yes.

* * * *

SIDNEY J. BERNARD, a witness called by and on behalf of General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Rhea

* * * *

Q. All right, sir, now with reference to those names who worked during the lockout, now where is this information? A. This information is very similar to the top, at no one time did all these employees—in other words, what we were trying to do was to maintain our stores, outside of Safeway, all of us are just independent operators and we have a big indebtedness and it was decided that we had to maintain the store, otherwise they could pick us off like they did Food Mart prior to us buying Food Mart out, so we had to maintain a Multi-Bargaining

Unit or otherwise we would be picked off. Therefore, after we decided that we would maintain our stores strictly on an individual basis, in other words each store [fol. 35] would maintain his own store—why we had the check here and if you'll notice on the Wednesday we were struck we had only one employee on this date with the exception of one of our managers down at the other store. They are not listed on here. She worked on that Wednesday.

Q. That would be a supervisory person? A. Leora Beavers.

Q. Do I understand the situation to be on her that she came to your store and worked that last day? A. She worked the first day of the strike. She worked on Wednesday and we didn't have anybody to work and we were struck with all that perishable merchandise. Then she continued—she worked on Wednesdays and Saturdays during when we didn't have any help.

Q. She is not listed here at all and is a supervisory person? A. Yes.

Q. Those that are listed then on the group at the bottom of the page worked during the lockout are all the people who worked not as supervisors but as sort of rank and file people? A. No, sir, this Cornelia Karutz, the very first one, she's our day-time manager at a drive-in and then Mrs. Beavers was our night-time manager.

Q. All right, you go ahead? A. The rest of them were mostly sack boys we picked up. If you notice a couple of them worked one day and one worked two days. We were just getting by as best we could.

* * * * *

Cross Examination by Mr. Keller

Q. Did any of you employers—did any of your employees report to work on the morning of March 16 which was the day of the strike of the Retail Clerks Union commenced? A. Not to my knowledge, no, sir.

Q. Did any of them ever report at any time during the strike? A. No.

Q. Have all your employees who have asked for reinstatement after the termination of the strike been reinstated? A. Yes.

Q. Are they receiving all benefits applied for under the terms of the contract negotiated on April 22, 1960? A. Yes.

Q. Are these employees who were employed after the strike commenced employed as temporary employees? A. Yes, sir, and they were let go immediately that Monday morning—that Saturday night. Mr. Carl Canon called and said as you know the strike is over with and he said some of your employees are available and some [fol. 36] are not—he said that we agreed in the multi-employer unit that starting Monday your employees will commence working and he said outside of your store manager will be only one there and that's all we had.

Q. Were you contacted the night before the strike by any union individual—representative with reference to signing an individual contract? A. Yes, sir, Mr. Carl Canon as representative of *International* Clerks 462 came by the store.

Q. And what did he say to you? A. He said that this was the last chance for us to sign a contract, that there was going to be a strike tomorrow and he indicated if I was going to be a sucker and let Safeway sucker me into this and would Safeway pay my bills if we were struck and I said, "no, sir, they wouldn't", and then he took another approach and went on to tell me about super market in Denver and Trinidad and said how they made their first million by signing a contract while Safeway and the other grocers were on strike and I referred him to Mr. Jones who was our multi-bargaining agent and then he went back to the back room with our Vice-President and discussed a little more pros and cons about it and our Vice-President who was former president of the machinists union and—he's been a very strong union man. My father was a union carpenter and my brother is a union electrician. In fact, my father was a union steward and we are not against at all collective bargaining. I think it is one of the best things that ever happened to this country.

Q. Was Mr. Lenn Jones authorized to represent you in any respect other than the collective bargaining for a new bargaining contract? A. That was all that he was authorized to do.

Q. Was anybody ever authorized to represent you with respect to how your stores would operate—your store would operate during the period of the strike? A. No, we were on our own.

Q. Was there ever any discussion among the members of the Multi-Employer Bargaining Unit as to how each member of the unit would operate his store or stores in the event of a lockout or strike? A. Yes, sir, after the Multi-Bargaining Unit decided that it was a threatened strike and in order for us to keep from being picked off one by one it was decided then that a strike against one would be a strike against all.

Q. Was there ever any cooperation between any of the stores who were members of the Multi-Employer Bargaining Unit with respect to the operations of their stores after the strike commenced? A. No, sir.

[fol. 37] Q. Did each member of the Multi-Employer Bargaining Unit from the beginning of the strike act independently of each other? A. We acted independently of each other.

* * * *

Redirect Examination by Mr. Rhea

* * * *

Q. Yes, sir. Now, on the morning of the strike, on March 16, did you have occasion to call the other members of this Multi-Employer Unit, such as Safeway and Brown and Cashway and Thrifty Way and advise them of the picket on your establishment? A. Yes.

Q. And did you talk to each one of them in turn that I've mentioned here—Safeway, Cashway, Thrifty Way and Brown? A. They were advised. I didn't personally advise all of them.

Q. I'm having a little trouble reconciling that with your testimony that each man was on his own during the strike? If each store was on its own why did you take the time to call the other members of the Multi-Employer Unit? A. Why did I?

Q. Why did you do it? A. Well mainly because how would they know that they were on strike aftey they had been told that a strike against one was a strike against all?

Q. Now, if the strike had occurred first against Cashway, for example, were they to in turn have called you and told you a strike—a picket had been placed there? A. As far as I know.

Q. Had there been prior meetings among respective store members of this unit that if a strike was placed on one store that each of the stores would lock out the employees in each of the remaining stores? A. Right.

Q. Was that not the purpose that you called each of the other members about on that occasion on March 16th? A. Well, now we didn't—let me correct that—it wasn't a lockout, it was a strike.

Q. Let's call it a strike. If the strike had occurred with reference to one of the other stores, would you not have locked out your employees at your sore? A. I would.

* * * *

JOHN H. BROWN, a witness called by and on behalf of General Counsel, being first duly sworn, was examined and testified as follows:

[fol. 38] Direct Examination by Mr. Rhea

Q. State your name for us? A. John H. Brown.

Q. You are connected with what Food Store in Carlsbad? A. Brown's.

Q. Can you tell us based on your examination of your books the names of the people—first of all who were working in your store immediately prior to the lockout on March 16th? A. Yes, sir. Our accountant got this letter and it was Juanita Blanchard, Bernice Turnbow, Lupe Viscano and Jerry Brooks.

Q. Those were your regular clerical employees who belonged in this unit at that time? A. Correct.

Q. All right, now, beginning on March 16, they were locked out, I take it, is that right? A. Yes.

Q. All right, each of these you've named? A. Yes, sir.

Q. Then can you tell me those who worked in their absence from March 16 to April 22—doing the same kind of work that they were doing? A. Now this would not be full time because they—my wife and my partners wife worked some too. Oleta Shaffer—assistant manager's wife worked a total of four days. Eulojia Aguilar—he worked the entire time of the strike as a sack boy as a transfer from the other store in Loving. Gloria Burba, the market manager's wife worked a total of four weeks.

Q. Have you given us all the employees now that worked during the lock-out period? A. As far as I can recall and shown on the payroll records. This doesn't count my wife and partner's wife who received no pay whatsoever.

Q. Well, I want the names of everybody who performed services for you during the time whether they received pay or not who were actually non-union employees. Now, as far as I'm concerned, I might explain to you, I don't care whether they are relatives or who they were, but I would like to have their names, whoever they are? A. My wife normally works in the office, she works some out in front and some in the office.

Q. Her name? A. Noma Brown. Approximately half time on the floor as a checker and half time in the office where she regularly works and Anna Belle Gossett, worked the other half of the time in the office. The other partner's wife at the store in Carlsbad.

Q. I understand you have two stores in Carlsbad only? A. No, one in Loving and one in Carlsbad.

* * * *

Q. Did you have a conversation with them with reference to their working on that date? A. Let me make one correction here. One of the girls was on her day off but [fol. 39] she called in. Now, I brought them in the office and told them that we were involved in a labor dispute and were on strike and that I hoped it would be over soon and could call them back to work.

* * * *

Cross Examination by Mr. Keller

* * * *

Q. Would you tell us what your capital investment is?

MR. RHEA: If the Examiner please, I can't see the relevancy of this.

MR. KELLER: Mr. Examiner, I'll put it this way, the relevancy of this question, that part of our defense is this strike or lockout *of* whatever you wish to call it is that these small independent grocers who had their life-time capital investment in their business that they were operating under a capital indebtedness and were handling perishable food stuff and that it was absolutely necessary for them to continue the operation of their stores during the period of the strike or lockout.

TRIAL EXAMINER: But of course the law is clear as to the fact that an economic necessity does not justify a violation of the law or excuse it. Whether it was or would have been an economic disaster for them to operate otherwise—I sustain the objection.

MR. KELLER: Could I offer proof?

TRIAL EXAMINER: Certainly.

MR. KELLER: We would prove through this witness that he has a large lifetime capital investment, which represents his lifetime earnings in this business; that he is operating under a current heavy indebtedness; that his grocery store handles perishables and food stuffs; that he could not operate or continue in business if he was permitted to be struck for a long period of time.

TRIAL EXAMINER: All right, the offer is rejected.

* * * *

Q. Could you tell us when the decision was reached between the members—employer members of the unit to send their employees home in the event that any one of [fol. 40] them was struck? A. Yes, I believe at a meeting at Hobbs, New Mexico on February 20th that agreement was reached by the employer bargaining unit.

* * * *

Q. Did anybody approach you relative to signing a separate and individual bargaining agreement during the period of the strike? A. Yes.

Q. Who approached you? A. William Smith, Assistant Regional Director, AFL-CIO, Storeworker's Union.

Q. When he approached you was he by himself or with a committee? A. No, I believe they call themselves the Central Trade Union at Carlsbad, was with him.

Q. Where did he contact you? A. At my store.

Q. What did he say to you? A. He asked if he could talk with me concerning a separate contract and I told him I was a member of the Multi-Employer Bargaining Unit and that Mr. Jones was handling it and he told me I was letting Safeway make a sucker out of me. He also said he was from back east and there were ways and means of forcing me to sign a contract other than the union pressure and I told him I didn't believe it would be morally right to sign a separate contract when I had given the other employers my word and he said—he informed me that morals were made from day to day, subject to change and I told him I believed he was on my lunch hour and I was going to lunch.

* * * *

Q. Did you authorize Mr. Lenn Jones to act on your behalf in any respect other than negotiations of a new bargaining agreement with the Retail Clerks? A. Just for bargaining with the Retail Clerks only.

Q. Have you authorized any other person to act on your behalf with respect to the manner your store would be operating during the period of the strike? A. No, sir.

Q. Did you reach any agreement with any member of the Multi-Employer Bargaining Unit as to how stores would be operated as a unit during the strike? A. No, sir, we each acted independently as best we could.

Q. MR. KELLER: I think that's all.

Redirect Examination by Mr. Rhea

Q. Mr. Brown, I'm not sure I understand—this man Bill Smith who contacted you about signing an agreement, could you identify him for us? A. I think I have his card somewhere in my billfold. Mr. William J. Smith, Assistant Regional Director, Washington, D. C. Phone—office phone, Reg. 18. Office in Phoenix, Arizona.

* * * *

[fol. 41] TRIAL EXAMINER: On the record.

STIPULATION OF COUNSEL AND EXHIBITS RECEIVED

MR. RHEA: It will be stipulated by and between counsel for and each of the respondents, counsel for the General Counsel as follows: That some of the members of the grocery industry in Carlsbad, New Mexico, have negotiated a collective bargaining agreement on a multi employer basis for many years during which time successive contracts have been entered into with the Union; that each of these contracts has contained a union shop clause; that *duirng* the time of negotiations on an industry wide basis there has not been a single unfair labor practice charge filed with the NLRB against any member of the multi employer bargaining unit nor has there been a single arbitration case; that during this period of years of collective bargaining negotiations, relations between Union and members of the *mulit* employer bargaining group have generally been very good; that each employer member of the multi employer unit with exception of Safeway Stores, Inc., voluntarily recognized the Union as the bargaining agent for its employees without the necessity of an election being held under the direction of the National Labor Relations Board; that there has never been any refusal on the part of spokesmen for the multi employer bargaining unit or on the part of any member thereof to meet with the Union and discuss matters arising out of the terms of any bargaining agreement that has heretofore existed prior to bargaining meetings of 1960 between the members of the Multi-Employer Bargaining Unit and the Union. On September 17, 1959, the Union gave notice that it requested additional bargaining and at that time submitted a copy of its proposed changes in the old agreement which was to expire shortly and this letter of re-opening and the proposed changes in that bargaining contract have been marked and are incorporated herein and made a part hereof, namely, as GC 2-A and GC 2-b; that approximately three of the notices to reopen the contract were mis-directed by Mr. R. L. Coulson, Union business representative and were not received by the proper employer in time to constitute a valid open-

ing under the terms of the contract then in effect; that however, the members of the multi-employers bargaining unit have waived this failure to properly open the terms of the contract which expired on December 1, 1959 and have, as heretofore set forth met and bargained with the Union; that a copy in duplicate is entered of the old contract which comes in two parts, the first part marked as an exhibit, GC 3-A, a copy of the contract with Safeway expiring December 2, 1959; and an Exhibit marked GC 3-B, which is a copy of the individual contract, signed with all other Respondents other than Safeway, which [fol. 42] expired on November 25, 1959. * * * Mr. Lenn Jones represented not only his company, Safeway, but was authorized by separate letters hereinafter identified to represent all the other members of the multi-employer bargaining unit in regard to the negotiation of a new collective bargaining contract; that there was bargaining on a multi employer basis in the grocery industry in Carlsbad since approximately 1948. Successive contracts have been negotiated on a multi-employer basis with the Meat Cutters Union dating back to 1948. There has been bargaining on a multi-employer basis in *Carlsabd* with retail clerks dating back to at least 1957, during which time three successive collective bargaining contracts have been entered into. Each of these three contracts contain a union shop clause. Safeway has negotiated with the retail clerk's union in Carlsbad since approximately 1950 and has since that date entered into five collective bargaining units with the retail clerks' union, all of which include a union shop provision. At the first bargaining meeting which was held on January 15, it was understood between the members of the multi-employer unit and the union representatives there present that Mr. Lenn Jones referred to above who handles industrial relation matters and collective bargaining for Safeway was authorized through separate letters to speak for the other members of the multi-employer unit.

* * * At this meeting on February 17, 1960 all portions of the new contract were agreed to except wage increases and the retroactivity of the wage increases. At the negotiating session on April 21, 1960, an agreement

between the members of the multi-employers' unit and the union was reached at approximately 1:30 in the morning. * * * At the negotiating session on March 2, 1960, the Union advised the members of the multi-employer bargaining unit that a strike vote had been taken and that a strike had been authorized. The Union did not advise when the strike would take place or which members of the employer unit would be struck or if all would be struck. The members of the multi-employer unit advised the union at the March 2, 1960 meeting that—and further advised that they would not permit the Union to pick them off one at a time and put out of business each employer like they had done with Food Mart. Food Mart was a Carlsbad Grocery Company which went out of business in 1959 following a strike by the Retail Clerks' Union. The night before the strike Carl *Cannon* contacted Sidney Bernard of Food Jet and Arnold Crabb of Thrifty Food Stores and attempted to get them to sign individual contracts like the contract Your Food Grocery Company had [fol. 43] signed. Your Food Grocery Company is not a member of the Multi-Employer Bargaining Unit. They did not present the contract that Your Food Store allegedly signed. GC-Exhibit 11 is a telegram sent by Harold Canon as Secretary of Retail Clerks Local Union 462, to Mr. Lenn Jones, branch manager, Safeway Stores, Inc., Industrial Relations Division at 8:20 A.M. on March 16, 1960, the morning the Union struck Food Jet. This telegram was read to Mr. Jones in Midland, Texas, at 10:30 A.M. on March 16, 1960. GC Exhibit 12 is a telegram sent by Harold Canon, Secretary of Retail Clerks Local Union No. 462 to Mr. Lenn Jones, Safeway Stores, at 12:49 P.M. on March 16, 1960. GC Exhibit 13 is a telegram sent by Mr. Lenn Jones, group spokesman for the Multi-Employer Bargaining Unit to Mr. Paul W. Hansen, Third Vice-President of the Retail Clerks International Union at 8:40 A.M. on March 18, 1960. GC-14 is a telegram sent by Lenn Jones, group spokesman for the Multi-Employers Bargaining Unit to H. H. Atkins of the Federal Mediation and *Concilliation* Service at 8:40 A.M. on March 18, 1960. That completes the situation up to this point. This stipulation is limited to the

fact that the individuals whose names appear hereon who are employes of the members of the Multi-Employer Bargaining Unit are in fact, members of the Union;

[Thereupon the documents heretofore referred to were marked as GC Exhibits 2-A 2-B, 3-A, -3-B, 4, 5, 5-A, 5-B, 5-C, 5-D, 6, 7, 8-A, 8-B, 8-C, 11, 12, 13, 14, for identification].

* * * *

TRIAL EXAMINER: The stipulation is noted and General Counsel's Exhibits as offered in the stipulation are received.

* * * *

ROBERT SCHOBERTH, a witness, called by and on behalf of General Counsel, having been previously sworn upon his oath, was examined and testified as follows:

Direct Examination by Mr. Rhea

Q. Mr. Schoberth, you testified here yesterday I believe and were sworn and under oath at that time? A. Yes.

Q. You are still under oath today. We started to examine a list of employees who you were requested to furnish who are employees of your company during the peri- [fol. 44] od of this lock-out or strike. Since that time have you been able to examine this list further. Can you tell us now the names of the people who worked for you during this period? A. Yes.

Q. Would you like to use the list and explain? A. I grouped the employees from this total list of 60 names and several classifications would be similar.

TRIAL EXAMINER: These people who work in Store 62 or 43? A. They are designated on my list. The first list I have are employees who were present at the beginning of the strike at Safeway Store #43 Halagueno. Tom Hernandez, Tony Matta, Wanda McClarey, Virgie Hartley, Johnnie Wilson—Jimmy Wilson, that is, Reuben Carasco, Clarence Blackburn, Eutimio Navarrette, Carl Smith, John Julian.

Q. Now, can we follow that with a list of the people who worked during the lockout, the lockout itself, after these people were locked out on March 16th? A. Yes, sir, but they are not designated by store.

Q. Well, at this point, let me ask you this: On March 17, for example, was Store 43 still open on that date, that would be after the lockout began? A. No, sir, it was not.

Q. Your report necessarily relates these people who were employed here only at Store 62? A. Safeway Store 43 was closed for a period of nine operating days.

Q. Nine days? So for the first nine days your list now refers to employees at Store 62? A. That is correct.

Q. After that date it would refer to both 43 and 62? A. Yes, sir.

Q. All right, due to that explanation, go forward with those—list those who were working for those two stores during the lockout period? A. I still have the list of 62. You don't want to get into that yet?

Q. Well, you are reading those who worked for 62 prior to the lockout? A. Correct.

Q. All right, go ahead? A. Glen Pike, Harold Canon, Vance Garner, John Kimberly, Juanita Durham, Flora Sanders, *Ramond* . . . (interrupted)

* * * *

A. Raymond Methola, Dale Peden, Mary Payte, Herman Bradshaw, Robert Hamblen, Ronald Bartholomew, Charles Hinkle, David Tuttle, Kenneth Chapman, Allen Shahan, Grady Enger.

Q. Is that the complete list? A. That's a complete of employees that were present before the strike at both Safeway Stores 62 and *42*.

[fol. 45] Q. All right, sir, now, is it possible for you to separate for us the employees who worked during the first nine days of the lockout from those who worked after that date,—if it isn't, just tell us? That would be the period when you combined both stores as I understand it and closed 43? A. Yes, I can do that.

Q. All right would you do that for us first? Now, this would be the group that worked at 62 during the first nine days? A. These are Safeway store managers from other

areas. Verdis Pack, Viron Wallace, Dale Spears, Howard Holder, Richard Thompson, Carl Lorey, John Coldwell. These are people we brought in. I now have some names of people who were hired locally. They were all in the box boy classification.

Q. Those which you have just named were brought in from other stores? A. Yes.

Q. This that you are about to name are people who were box boys who were hired at that time? A. Temporary employees.

Q. Thank you? A. Freddie Prewitt, Robert Freeman, Perry Andrews, Juan Lujan. That is the complete list. During the first nine days.

Q. Do you know—can you now add to that please those who worked for both stores after the first nine days? A. Yes.

Q. All right? A. John Crunk, William Butler, Robert Gonzalez, Raymond King, James Cantu, Charles Bentley, Everett Evans, Charles Borcherding, Clarence Stahl, Joyce Nix, Willia Ratliffe, Joe Venegas, Rolle Shaw, Gary Glover, E. Alvarez, Ramon Muniz, Orville Dunaway, S. E. Torres. That completes the list.

Q. This would cover the employment up to the date of April 22, 1960, is that correct, Mr. Schoberth? A. No, sir; these are still—well, I'm sorry—I missed some. May I add some.

Q. Yes, what is this you are adding? A. These are people hired locally as temporary employees who were hired after the first nine day period.

Q. After the first nine day period? A. Yes.

Q. And you're adding to that list now? A. Correct.

Q. All right, thank you. A. Billy Upton, Wayman M. Howell, Tommy Martinez, Richard Franko, James Floyd, Clayton Fike, Walter Wright, Severo Ortiz, Ricardo Vidal, Robert Shirley. That is the complete list.

Q. All right, thank you. Now, Mr. Schoberth, can you tell us if any of these employees which you have here named, including, of course, the list of people during the first nine days and all those who worked from the expiration of nine days and up to April 22, if any of those people [fol. 46] continued to work for you after April 22, is it possible to designate that closely, or are you able to do

that? A. Well, the people who were brought in from other areas all went back to their respective jobs in that specific store. They are all presently employed.

Q. Are presently employed but not necessarily at that store? A. But not necessarily at the Carlsbad store. They came from various stores in the area that I cover and they have since returned to that store.

* * * *

Cross Examination by Mr. Keller

Q. Mr. Schoberth, can you tell us whether or not Safeway sent home on the morning of the strike all employees who were in the bargaining unit? A. Yes.

Q. When was the decision made to send home all the employees in the bargaining unit in the event of a strike? A. We met at Hobbs the latter part of February—the last Saturday in February, I believe. Most of the employers met at Tootie's—Tootie Schnaubert's Cashway there and at that time it was decided that in the event of *a* economic strike that a strike against one would be considered a strike against all and any action taken against one—the rest or remaining part of the group would send all employees home.

Q. Why was this decision reached? A. We felt that we couldn't be placed in the position of being picked off one at a time. We had to present the same united front that the union was presenting toward us.

Q. Did—what did you tell your store managers to tell the employees if there was a strike at any store who was a member of the Multi-Employer Unit? A. They were instructed that in the event of a strike against any of the unit that they were to inform the employees to go home, that they would be called back when there was a job available again.

Q. That is following the strike? A. Following the strike, yes.

* * * *

Q. Could you tell us, sir, whether Safeway has a joint company employee insurance plan? A. Yes.

Q. This plan was continued during the period of the strike? A. Yes.

Q. You have previously testified that people from other Safeway stores in other towns in this area were assigned to the Carlsbad store during the period of the strike. Were they temporarily assigned here? A. All of them were temporarily assigned. One list of approximately 9 or 10 names were store managers from other areas, who [fol. 47] would of necessity had to have been temporary employees.

Q. Now, how long the store managers each work in the Carlsbad store? A. Generally we assigned them for a day—three-day period. There was three exceptions who worked four days.

Q. Were the assistant store managers also similarly assigned for short durations? A. All but two were here for a four-day period. Four-week period—those were generally assigned for a one-week period.

Q. When the strike was over was the stock in the store in rather bad shape? A. The stock was consistently in rather bad shape during the strike.

* * * *

Q. Could you *well* us, sir, whether the store manager and assistant store managers that were temporarily transferred into Carlsbad stores during the strike were supervisors? A. Yes, they were supervisors.

* * * *

Q. (By Mr. Keller) the box boys which were hired locally, were they for the most part young highschool and *junion* highschool boys? A. For the most part they were young boys. Some were not in highschool. They were available on a full time basis.

Q. Some were part time and some were full time box boys? A. Yes, sir.

Q. Would some be regular, full time or part time and some not regular full time and part time employees? A. They were all termed as part time employees. They were all hired as temporary employees.

Q. Can you tell us what job duties were of the employees who *were* hired locally as temporary employees. A. Well . . . (interrupted)

Q. That were classified other than as box boys? A. The only employee that we hired in a classification other than box boy was Walter Wright. He was hired as a Food Clerk. His duties consisted primarily of stocking and carrying boxes out or working as a box boy.

* * * *

WAYNE ALLEN DISNEY, a witness, called by and on behalf of General Counsel, being duly sworn, was examined and testified as follows:

[fol. 48]

Direct Examination by Mr. Rhea

Q. Will you state your name for us, please, sir? A. Wayne Allen Disney, Tootie's Cashway manager.

Q. You are manager in Carlsbad? A. Yes, sir.

Q. Now do you have available to you and at your fingertips the names of the employees who were working in the clerical unit for the Cashway Store in Carlsbad immediately prior to March 16 when this strike or lockout began? A. Yes, I do.

Q. Can you give us those names, please? A. You mean regular employees?

Q. That is regular employees before this all began? A. Charles Blackburn, Bobby Bars, Dwayne Compton, Jo Nell Cox, Wayne Disney, Charles Davis, Danny Dunning, *Geverly* Fletcher, Ray Fletcher.

* * * *

A. Charles Healer, Bobby Johnson, Alfredo Lira, Jesus Lira, Wayne Modrall, Janie Roberts, Weldon Stafford, O. J. Smith, Dorothy Titus, Gary Watkins.

Q. Can you tell me about an employee named J. H. Carbell, are you acquanted with that individual? A. Yes, sir.

Q. They were not employed prior to the lockout? A. He was, his name is not down there, I'm sorry.

Q. He should be added to the list? A. Yes.

* * * *

Q. All right, can you tell us please, the names of the people who were in your employ immediately after this deadline date of March 16, and who continued from that time forward to work in the same unit doing the same kind of work—after the lockout or strike—well, during the time of the lockout—I guess we're going to use that term. March 16, 1960 to April 22, 1960, is what we're trying to reach. A. If you'll excuse me, I'll ask a question?

* * * *

A. You want them now that worked during the lockout period?

Q. Right? A. Wayne Disney, Ivan Folson, Fernando Lira, Mike McDonald, Robert Tachezo, Hazel Wilson, Steve E. Schnaubert.

Q. Where does Mr. Steve Schnaubert ordinarily work? A. He is our personnel manager in the general office.

Q. He normally works in Hobbs, is that right? A. Yes. Helen E. Schnaubert, Steve E. Schnaubert, Jr. Bill Roberts, Douglas Wilson, Doug Buckner, Joe Bishop, Eunice L. Fuller, Charles Lyons, Norma Wright, John Webb, Robert Shirley, Johnnie Vanegas, Ivan Winifred. [fol. 49] Q. Now, Mr. Disney, do you know of your own knowledge who of these people in this list were actually a supervisory people, either in your store or in some of the other Cashway stores? A. Yes, sir.

Q. Can you tell us their names, please? A. Steve E. Schnaubert, Bill Roberts.

Q. What capacity did he occupy before that lockout, do you know? A. He is manager of Cashway No. 6 in Hobbs.

Q. All right, sir? A. Doug Wilson.

Q. All right, what position did he occupy previously? A. He is manager of Cashway No. 1, Hobbs.

Q. All right? A. Doug Buckner who is produce supervisor.

Q. At what store? A. He was over all six stores in produce—in the buying of the produce and general pricing.

Q. All right, sir? A. Joe Bishop.

Q. All right? A. He was manager of Cashway No. 3 in Hobbs.

Q. All right, sir? A. Eunice L. Fuller who was assistant manager of Cashway No. 1 at Hobbs.

Q. All right? A. Bob—Charles Lyons who was manager of Cashway No. 2 in Lovington, New Mexico. John Webb, Assistant Manager of Cashway No. 3, Hobbs.

Q. That is the completed list?

TRIAL EXAMINER: How about Wayne Disney? A. Manager, Cashway, Carlsbad.

Q. And you worked throughout the lockout too, did you not? A. Yes.

Q. The other people that you have not named, are what we might consider rank and file people who worked in the clerical unit during the time of the lockout—is rank and file a good term? A. Yes, sir, its the last names that I gave you.

Q. I am trying to focus now for just a minute on those that you haven't just previously named, in other words, those that you've designated who are non-supervisory—that that you didn't name were rank and file clerical people who worked in this store during the lockout? A. Yes, worked and came from other stores. I believe three came from our other stores in Hobbs.

Q. Well, I suppose you are now telling me that some of these people worked as clerks probably in the Hobbs stores and they came over and helped you out during the lockout, is that correct? A. Yes, sir.

[fol. 50] Q. Let me ask you, of your own knowledge, do you know over *wht* period of time the people continued to come over who were supervisory people from Hobbs and helped you during the time of the lockout—in other words, was there a period of several weeks when they came over after that time and you operated fairly well on your own with your local people here? A. No, sir. These people—I can't give you the exact dates or what they worked here, but they did come over through the whole strike.

Q. Throughout the entire period, the entire approximate five weeks? A. Yes.

* * * *

Cross Examination by Mr. Keller

* * * *

Q. Did you talk to your employees on the morning of the strike? A. Yes, by phone.

Q. Did you talk to any of them personally? A. Yes, I did.

Q. What did you tell the ones that you talked to in person? A. You mean after the strike?

Q. After the strike commenced? A. Told them that Mr. Sid Bernard had called me about nine o'clock that morning and they had struck Food Jet and I think they were told, as our employees came to work, I told them that a strike against one was a strike against all and to protect the Multi Bargaining Unit. I told them that I—individually I talked to them as they come to work and told them that I hoped that it would be over with soon and they would be notified when to come back to work.

* * * *

Q. Did you pay employees who requested to be paid their vacation benefits during the period of the strike? A. Yes, sir.

Q. Could you tell us whether or not the company insurance plan for these employees was kept in effect during the strike? A. It was.

* * * *

Q. Could you tell us whether or not all of your employees were returned to work following negotiations of the contract on April 22nd? A. They were.

Cross Examination by Mr. Keller

* * * *

Q. Could you identify Mrs. Helen Schnaubert for us? A. Yes, sir.

[fol. 51] Q. Who is she? A. She is the wife of Steve E. Schnaubert.

* * * *

Q. Could you tell us what her relationship to Mr. Steve Schnaubert was? A. His wife.

Q. Could you tell us the functions, if any, she performs within the Schnaubert organization? A. She is cashier at Cashway No. 1 in Hobbs. She is second from our head bookkeeper. She takes the duties over of our head bookkeeper when she is on vacation or sick.

Q. Does she authorize payroll checks? A. She can, yes, when she is performing duties of our head *bookeeper*.

Q. Do you know from your own knowledge whether or not she has access to company personnel records? A. Yes, she does.

* * * *

Q. Could you identify for us Mr. Steve Schnaubert, Jr.? A. Yes, sir. He is the son of Mr. Steve Schnaubert who is personnel manager and general manager of the Cashway organization.

Q. Could you tell us whether or not Norma Wright who worked in the Carlsbad store during the period of the strike normally works in Store No. 1 in Hobbs? A. Yes, she does.

Q. She is temporarily assigned here to work during the period of the strike? A. Yes, sir.

Q. Could you tell us whether or not or could you identify for us rather, Mrs. Douglas Wilson? A. Yes, sir.

Q. Is she related to anybody with Mr. Schnaubert's organization? A. She is the wife of Doug Wilson who is manager of Cashway No. 1 in Hobbs.

Q. Could you identify for us Mr. Fernando Lira? A. Yes, sir.

Q. Who is he? A. He is—(interrupted)

Q. I am speaking of the one who was hired as a temporary employee during the period of the strike? A. He is the son of the produce manager at Cashway No. 4 in Carlsbad.

Q. Is he a young highschool boy? A. Yes, sir.

Q. Could you tell us who Mr. Robert Pacheo is? A. He is a boy who was home on leave from the Navy and had worked for Cashway in Hobbs when he was going to school prior to going into the Navy and he worked part time while home on leave.

Q. And would you identify Johnny Vinegas for us? A. He is a school boy here in Carlsbad who came in seeking employment after the strike had started.

Q. During the period of the strike did you ever solicit outside help or new employees? A. No, sir.

* * * *

[fol. 52] ARNOLD CRAB, a witness, called by and on behalf of General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Rhea

* * * *

Q. What stores, please, sir, are you connected with in Carlsbad? A. I am the owner of Thrifty Way Food Stores 1, 2 and 4.

Q. One, two and four? I take it there's no three at this time or is there? A. No, that has been closed up.

Q. Well, can you, Mr. Crab, Please, sir, as the owner of the chain, give us at this time, the names of all of your employees in the clerical unit who worked at your stores immediately prior to March 16 which was the date, of course, which this strike or lockout began? A. Well, I can give it to you by the stores.

Q. All right, sir, I think that'll be fine.

* * * * *

Q. * * * This will name all the employees now who worked for you prior to this period, March 16th? A. All right, sir. Joe Vasquez, Clerk, Donald Andrews, Sack Boy, Robert Cummings, Clerk, Belle Coulson, Clerk, Walter Titus, Clerk, and there could be some part time sack boys—could be Robert Willis and Edwin Phillips.

Q. Robert Willis and Edwin Phillips? A. Yes, sir.

Q. All right, now, that includes all of them that were employed in the clerk category prior to March 16th? A. Yes, sir, No. 2 Store, John Pirtle, Clerk, Aleen Eggleston, Clerk, Hirschell Skaggs, Clerk, Tommy Lawson, Clerk, William Langlitz and Gary Niblett, an irregular part time sack boy. No. 4 Store, Eddie Razo, Clerk, Ray Navarette, Milton Moore, Clerk, Vonda Narramore, Clerk, Mike Wyley, Clerk, Terry Tidwell, sack boy, Stanley

Davis, Clerk, Douglas Prior, box boy, Terrell McBee, box boy.

* * * * *

Q. All right, sir, now that completes the list of all those who were with you prior to March 16 lockout or strike, whichever you want to call it? A. Yes.

* * * * *

TRIAL EXAMINER: I understand the witness has given us the names first of No. 1 store and No. 2 store? A. And No. 4.

[fol. 53] Q. I am correct am I not that these were the people that worked prior to November 16th? I mean March 16th? A. Yes.

Q. Now can you take us to the next category, those who worked for you during the period of this lockout? A. The way I understand it, *its* not supervisory personnel would be listed in this?

A. Well, do you have the supervisors with you here now? A. No.

Q. You do not have? A. No.

Q. All right, so this will only include the rank and file of clerks and not supervisors, is that right? A. Yes.

Q. All right, go ahead. A. At our No. 1 Store, Robert Willis, box boy, Edward Phillips, box boy, Ronald Mourer, box boy, Alvin Rouse, box boy, Ashley Burns, Clerk, Wendell Smith, box boy. Since then some of the boys have quit. That's just some that worked irregular part time box boys.

Q. Those that quit, they were replaced by other people, is that what you're trying to tell us? A. No, sir, that's the total amount.

Q. That's the total number of those who were replaced or what have you? A. Yes, sir.

Q. All right, sir? A. And No. 2 Store, Gary Niblett, irregular part time box boy. That's all the employees.

Q. The only employees, the implication being there that everybody else was a supervisor who worked at No. 2 Store during the lockout? A. Yes, I worked there myself.

Q. And everyone else who worked there was a supervisor? A. Well, now, the manager's wife, but she wasn't paid.

Q. We'd like to have her name too. A. She relieved for lunches and all that.

Q. Anyone who worked there during that time, we'd like to have their names? A. Mrs. Clyde Brooks.

Q. Mrs. Clyde Brooks. Now we have reached this point, have you also excluded any persons who are relatives who worked at No. 1 Store or have you included them in the list you have given us? A. No, sir, no relatives.

Q. No relatives at all? A. No, sir.

Q. Were there any other persons now other than Niblett and Brooks that worked at the No. 2 store during this time, except supervisory people? A. No, sir.

Q. I have the name of an employee named Donald Stahl, do you know whether or not he worked during this time. A. I haven't got to that No. 4 Store yet.

Q. I'm sorry. Thank you. A. No. 4 Store, Addie Black, Clerk, Don Stone, Clerk, Guy Brazill, box boy, [fol. 54] Robert Jesse, box boy, Linda Jesse, Clerk. Ted Crawford, box boy, Odie Russell, box boy, Gilbert Barns, box boy.

Q. That completes the list does it not for all three stores? A. My wife did work for No. 4 Store.

Q. And her name is what, please? A. Laura Ellen Crab.

Q. Had she been an employee prior to this time in your store? A. Yes, sir.

Q. Now how about—did you have an employee there by the name of Lee Gruber? A. Yes, he works in the market.

Q. In the market? A. Yes.

Q. He didn't work as a clerical employee during that time? A. Possibly part time, yes, sir.

Q. Is he ordinarily a supervisory employee or is he rank and file employee in the meat department? A. He ordinarily works in the meat department, yes, sir.

Q. Not as supervisory? A. Yes, sir.

Q. All right, Lee Gruber then should be added to the list should he not? A. (no answer)

Q. How about Royce Black? A. He's market manager. Market supervisor. No. 4.

Q. And Carl Jesse, did you have a Carl Jesse working there at that time? A. That's my manager.

Q. Your manager? A. Yes.

* * * *

Q. Now when the strike was called off on April 22, did you immediately return all of these employees to their jobs there who had worked for you prior to March 16th? A. Yes, with the exception of people who wanted off to attend to business.

Q. That would include all the people whose names you have given me here first with reference to all three stores? A. Yes, sir.

* * * *

Cross Examination by Mr. Keller

Q. Mr. Crab, did you enter into an agreement with the other members of the Multi-Employer Bargaining Unit to consider a strike against any member of that unit to be a strike against all? A. *yes*, sir.

Q. Would you tell us where you were when you entered into that agreement? A. It was on February the 20th at Hobbs, New Mexico at Tootie's Cashway No. 1 Store.

Q. Had you all discussed the possibility of entering into such an agreement prior to that date? A. Yes.

* * * *

[fol. 55] Q. I think you have testified that you had two box boys who worked, I'll say that you had several box boys who worked—irregular employees, is that correct? A. Yes, sir, they were irregular part time sack boys.

Q. These employees were not covered by the bargaining unit? A. No, sir.

Q. *were* they permitted to work during part of the period during the strike? A. Yes, sir.

Q. Had you authorized Mr. Jones or any other member of the Multi-Employer Bargaining Unit to represent you in any manner or capacity whatsoever other than the negotiation of a new collective bargaining contract? A. No, sir.

Q. Did you enter into any agreement with any members of the Multi-Employer Bargaining Unit as to how you would each operate your stores during the period of the strike? A. No, sir.

Q. In operating your stores during the period of the strike were you acting independently of each and every other member of the Multi-Employer Unit? A. Yes.

Q. Have all of your employees been returned to work with all the benefits provided for under the terms of the contract arrived at on April the 22nd? A. Yes.

* * * *

Q. Did you have an assistant store manager in that store after the strike? A. No, sir. The volume was off too much and it stayed off several weeks and we felt, between Harold Renfro and myself that we had no need of an assistant store manager.

* * * *

Q. Did you continue all your health and welfare benefits during the period of the strike? A. Yes, sir.

* * * *

THOMAS SCHNAUBERT, a witness called by and on behalf of the Respondents, after being first sworn on oath, was examined and testified as follows:

Direct Examination by Mr. Keller

Q. Will you state your name please? A. Thomas B. Schnaubert.

Q. Are you the owner of Cashway Food Store? A. Yes, sir.

[fol. 56] Q. Can you tell us whether or not you were present when a agreement was reached between the members of the multiemployers bargaining unit to treat a strike against any member of the unit as a strike against the entire unit? A. Yes sir. It was held in Cashway Number 1, 701 East Broadway in Hobbs. Mr. Schoberth from Safeway, Mr. Brown, Mr. Crabb and Mr. Grenault were present.

Q. What was your reason for reaching that decision? A. We had heard rumors of strikes pertaining to the Retail Clerks' Union—had decided to—they did strike—that if they did strike, one that would be against all of us and had to act as a multiple employer bargaining unit to fight such.

Q. You are a small operator? A. I'm a small operator.

Q. Have you authorized Mr. Lenn Jones to act for you in any capacity in any matter whatsoever other than in the negotiations of any collective bargaining contract? A. No sir.

Q. Have you authorized any other member of the multi-employer unit to act for you in any manner whatsoever? A. My brother sat in on the negotiations.

Q. I'm talking about any other member. A. No, sir.

Q. Did you enter into any agreement with any member of the multi-employer bargaining unit as to how you or they would operate their stores during the period of the strike? A. No sir.

Q. In operating your stores during the period of the strike did you operate them completely independently of all of the members of the multi-employer bargaining unit? A. Yes, sir.

* * * *

Q. During the period of the strike, did you pay your employees vacation benefits ? If they requested it? A. Three employees were paid. There were four of them.

Q. Did you continue the *senority* of your employees during the period of the strike? A. Yes, sir.

* * * *

LENN JONES, a witness, called by and on behalf of the Respondents, after being duly sworn, was examined and testified as follows:

Direct Examination by Mr. Keller

Q. Could you tell us your name, sir? A. Lenn Jones.

Q. And who are you employed by, Mr. Jones? A. Safeway Stores, Incorporated.

[fol. 57] Q. What is your job with Safeway Stores? A. Branch manager of Industrial Relations Department, Dallas, Texas.

* * * *

Q. (By Mr. Keller) Were you ever authorized to represent or act in any capacity for any member of this multi-employer bargaining unit, except with respect to negotiating the collective bargaining agreement? A. No, I was not.

Q. Do you know of any agreement between the members of the multi-employer bargaining unit as to how their stores would be operated in the event of a strike against any one of them? A. No.

Q. Could you tell us whether Safeway Store was operated completely independently from the other stores? A. Yes, they were.

Q. That's during the period of the strike? A. During the period of the strike.

Q. Were you present during most of the bargaining negotiations between members of the multi-employer bargaining unit and the Union? A. Yes, I was.

Q. You were spokesman for the employer unit? A. Yes.

Q. Were you present at the negotiating session on April 22nd, 1960 when the new contract was negotiated? A. It started April 21st and extended into April 22nd and I was present.

Q. You were there? A. Yes.

Q. Was there any discussion as to how employees would be returned to work at the respective stores? A. Yes there was. And I would like to refer to my notes on that if I may. My original notes—in that session there was Mr. H. H. Atkins, Federal Mediator, Paul Hansen, and Mr. Andrea. For the Union, I was present with Mr. Steve Schnaubert representing the industry and we discussed the—how we would set up our operations as we were coming out of the strike and I brought up the point that inasmuch as some of the businesses were down tremendously and perhaps there would be a good deal of time lapse before these normal business would be restored, that we as an industry felt we should have leeway on

putting our people back to work. And it was agreed with Mr. Hansen and Mr. Andrea, who was present, with Mr. Hansen being the spokesman made the agreement that we would return them to work and if it were necessary, not to put the entire staff back, but those with the least amount of *senority* would be the ones to be kept off work until such time that the company could put them back. As my notes show, we agreed that Section 8 of the contract which is the *senority* clause would be the governing factor.

[fol. 58] Q. Did you advise the members of the multi-employers unit as to your agreement with Mr. Hansen as to reinstatement of employees? A. I did. I advised the group that it would be necessary that all employees who were out on strike be put back to work; that if business were down and all couldn't be put back to work that they would have to be laid off in accordance to *senority;* that in no case could an employee who had been working replace any of the Union members who were to come back to work.

Q. Did you instruct Mr. Schoberth as District Manager of Safeway Stores as to how Safeway Stores would reinstate their employees? A. I did and I received word that there was a mixup in—and that Safeway perhaps wasn't following the agreement. I called Mr. Schoberth and reiterated again that we were to put them back in accordance with *senority*, and he said that they had used that principle, and I at that time referred him to speak to Mr. Hansen who was in Carlsbad and Mr. Schoberth reported to me later that he had discussed it with Mr. Hansen. And that Mr. Hansen was in agreement—that we had agreed in our meeting to put them back in accordance with *senority*. If there were any to be laid off due to the drop in business. I might add one point here if I may. One of the reasons (interrupted)

MR. RHEA: Is this an answer to a question? A. I was just going to mention why the drop in business.

MR. RHEA: I'd prefer that counsel ask the questions and let you answer them. A. All right.

Q. (By Mr. Keller) Have all of Safeway's employees been returned to work with full *employemnt* status and

benefits under the terms of the contract? A. All those who desired to return, yes.

* * * *

Q. Was Safeway ever notified before the strike that it would not be struck? A. No.

Q. Were you ever notified before the strike as to which of the stores might or might not be struck? A. No.

* * * *

[fol. 59] ROBERT SCHOBERTH, a witness, called by and on behalf of the Respondents, after first being duly sworn, was examined and testified as follows:

Direct Examination by Mr. Keller

Q. Mr. Shoberth, you have previously been sworn as a witness in this case? A. Yes.

Q. I think you identified yourself as District Manager of Safeway Stores? A. Yes, that's correct.

Q. Following the negotiations of the new contract on April 22, 1960, did you receive any instructions from Mr. Lenn Jones as to how Safeway personnel was to be returned to work? A. Yes I did.

Q. What did he instruct you? A. Mr. Jones gave me the rates of pay and various conditions of the contract that had been agreed upon, plus the fact that employees would be returned on a *senority* basis in the event that we didn't need everyone—that we should go by the *senority* list. Immediately following the meeting which early in the A.M. hours of the 22nd, the two store managers in Carlsbad and myself got together and determined what was necessary. Then the following morning when the store managers assigned the working schedule and hours, they then notified the people on a *senority* basis who was available. * * *

[Secretary's Certificate of the National Labor Relations Board. Omitted in printing]

[fol. 60] [File Endorsement Omitted]

[fols. 60A-60B-61] * * *

[fol. 62]

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MINUTE ENTRY OF ARGUMENT AND SUBMISSION—
February 25th, 1963.

* * * *

Before Honorable Alfred P. Murrah, Chief Judge, Honorable David T. Lewis and Honorable Jean S. Breitenstein, Circuit Judges.

This cause came on to be heard and was argued by counsel, Melvin J. Welles, Esquire, appearing for petitioner, William L. Keller, Esquire, appearing for respondents.

Thereupon this cause was submitted to the court.

[fol. 63]

IN THE UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

May Term, 1963

No. 7089

NATIONAL LABOR RELATIONS BOARD, PETITIONER

vs.

JOHN BROWN, IRVING L. GOSSETT and J. C. WEST, JR., doing business as BROWN FOOD STORE; TOOTIE SCHNAUBERT, doing business as CASHWAY FOOD STORE; SAFEWAY FOOD STORE, INC.; and ARNOLD CRABB, doing business as THRIFTY WAY FOOD STORE, RESPONDENTS

[File Endorsement Omitted]

On Petition for Enforcement of an Order of the National Labor Relations Board

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Melvin J. Welles (Stuart Rothman, Dominick L. Manoli, Marcel Mallet-Prevost and Gary Green were with him on the brief for Petitioner.

William L. Keller (Clark, Reed & Clark, Robert L. Clark and Allen Butler were with him on the brief for Respondents.

On the brief for Amici Curiae were Joseph M. McLaughlin and Frederick A. Morgan of McLaughlin and McLaughlin,; Food Employers Council, Inc.; California

Assn. of Employers; California Metal Trade Assn.; Distributors Association; Employers Council of Monterey County, Inc.; Federated Employers of San Francisco; Federated Employers of the Bay Area; Peninsula Employers Council, Sacramento Valley Employers' Council; San Francisco Employers Council; San Fran-
[fol. 64] cisco Retailers' Council; San Joaquin County Industrial Association; and Valley Employers Association.

OPINION—filed June 17, 1963

Before MURRAH, Chief Judge, and LEWIS and BREITENSTEIN, Circuit Judges.

LEWIS, Circuit Judge.

This case presents a single problem but one novel and important in the area of multi-employer bargaining under the National Labor Relations Act. The determinative issue, broadly stated, is whether the non-struck members of a multi-employer bargaining group who have locked out their employees following the initiation of an economic strike against one member of the bargaining group may operate with temporary replacements. Tht National Labor Relations Board, two members dissenting, found that the hiring of replacements by the non-struck employers rendered the lockout unlawful and hence violative of Secs. 8(a)(1) and 8(a)(3) of the Act. The present petition seeks enforcement of the Board order requiring certain remedial action upon the part of respondents.[1] The alleged unfair labor practices having occurred in Carls-
[fol. 65] bad, New Mexico, this court had admitted jurisdiction under Sec. 10(e) of the Act. 29 U.S.C.A. sec. 151, et seq.

The case arises from a factual background which leaves the determinative question free from the complication

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[1] Originally named in the charges were Food Jet, Inc. and Lenn Jones, Agent of Multi-Employer Bargaining Association, but each was found not to have violated any provision of the Act. The present petition thus seeks no enforcement aid against either but Food Jet, Inc., is sometimes included in general references made to respondents.

of disputed side issues of fact or law. Respondents are operators of seven retail food stores in Carlsbad, New Mexico, who have traditionally bargained upon a group basis [2] with the recognized bargaining agent of its clerical employees, Local 462 of the Clerks International Association. For many years the Union and respondents had enjoyed an amicable relationship and their collective bargaining procedures had resulted in agreements containing a union shop provision and in settling problems of wage increases and similar customary subjects of negotiation. On September 17, 1959, the Union gave notice of its desire to bargain on proposed changes in the then current contract which was due to expire shortly. The notice was not timely but respondents waived the technicality and agreed to bargain. The parties met on January 15, 1960, and both Union and respondents bargained in good faith at numerous sessions thereafter. By February [fol. 66] 17, 1960, complete accord had been reached as to all provisions of the new contract except the amount and retroactivity of wage increases. Bargaining continued and at a session held March 2 the Union informed respondents that a strike vote had been taken and a strike authorized. No information was given as to when, how or against whom the threatened strike would be effectuated. Respondents replied that "they would consider a strike against any of them to be a strike against all of them."

On the morning of March 16 the Union struck a single store, Food Jet, Inc.[3] Respondents immediately locked out their employees and informed them they would not

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[2] Multi-employer bargaining is a recognized and generally successful negotiating procedure of benefit to labor and management alike. Amici Curiae point out that in Southern California approximately 1014 food operators bargain as a single unit with the various Locals likewise coming to the bargaining table together.

[3] This action is the initial step in the so-called "whip-saw" strike. Usually the smallest of the group is struck in order to focus the economic burden of the strike at the weakest point. If successful at this point, successive strikes follow against other single members of the group until the final goal is accomplished. The technique is not novel to labor problems and finds use in many aspects of economic, and, indeed, political life.

be allowed to work for the duration of the strike against Food Jet, Inc. Each store operated on a limited basis during the strike and lockout. Food Jet, Inc., hired replacements for its striking employees. Safeway closed one store but operated another through the transfer of personnel from other areas; the other respondents remained open through the efforts of supervisory employees, relatives and temporary employees hired only for the [fol. 67] duration of the controversy. Bargaining between the Union and respondents continued and resulted in an agreement reached on April 22, 1960. All regular employees were immediately returned to work with full status rights and benefits.

The decision of the Board that the act of respondents in hiring replacements is discriminatory in violation of Sec. 8(a)(3) and coercive in violation of Sec. 8(a)(1) is not premised upon evidentiary findings of unlawful motivation and hence does not fall within that class of case where an otherwise permissible course of conduct by an employer may be rendered unlawful by the specifics of subjective intent. Labor Board v. James & Laughlin Steel Corp., 301 U.S. 1, 57 S. Ct. 615, 81 L. Ed. 893; Associated Press v. Labor Board, 301 U.S. 103, 57 S. Ct. 650, 81 L. Ed. 953; Olin Matheson Chem. Corp. v. Labor Board, 352 U.S. 1020, 77 S. Ct. 587, 1 L. Ed. 562. And see Utah Plumbing and Heating Contractors Assn. v. N.L.R.B., 10 Cir., 294 F. 165. But lack of evidence of specific unlawful intent by an employer is not fatal to the decision of the Board if the conduct is such to carry its own indicia of intent sufficient to place the question within the orbit of the Board's prerogative of balancing the legitimate interests of labor and management in furtherance of the general purposes of the Act. N.L.R.B. v. Erie Re- [fol. 68] sistor Corp.,—U.S.—, decided May 13, 1962. The crux of the Board decision here is premised upon an ultimate finding of unlawful intent based upon indicia appearing from the uncontaminated course of conduct of respondents in hiring replacements. The Board expresses it thus:

> "If the union could successfully strike one at a time, the other members of the employer unit would in or-

dinary circumstances continue operating to the severe economic damage of the struck member, and each in turn could be driven to the wall in the 'whipsaw'. For this reason, if one member is shut down by a strike, the others may also shut down, but they are not required to do so. If the struck member operates through replacements, no economic necessity exists for the other members shutting down. If in those circumstances they resort to a lockout and hire replacements, it may be reasonably inferred that they do so not to protect the integrity of the employer unit, but for the purpose of inhibiting a lawful strike. In short, the lockout in these circumstances ceases to be 'defensive' and becomes 'retaliatory'."

Can it be reasonably inferred that the act of hiring [fol. 69] replacements, per se, is "retaliatory" rather than "defensive"? We think it cannot and hold that the Board in so doing has misinterpreted and misapplied the principles set forth by the Supreme Court in Labor Board v. Truck Drivers Union (Buffalo Linen), 353 U.S. 87, 77 S. Ct. 643, 1 L. Ed. 676, and Labor Board v. Mackay Radio & Tel. Co. (Mackay), 304 U.S. 333, 58 S. Ct. 904, 82 L. Ed. 1381.

In *Buffalo Linen* the Court gave its stamp of approval to the recognition by the Board that after the initiation of a whipsaw strike a threat of strike existed against the other employers which created an economic problem legally justifying a temporary lockout of employees. Basically we interpret *Buffalo Linen* as upholding the legitimacy of multi-employer bargaining and a recognition that to preserve the equality of such bargaining the employer may resort to self-help when the legitimate interests of employer and employees collide. Thus the efforts of the whipsaw strike to atomize the unity of the multi-employer group can be lawfully neutralized by the utilization of a temporary lockout. The decision in *Buffalo Linen* went no further for the factual background went no further. In the case at bar neither Food Jet, Inc., the struck employer, nor respondents, who locked out, remained totally inoperative as in *Buffalo*. Here, each remained in limited operation by hiring temporary re- [fol. 70] placements.

In *Mackay*, the Supreme Court firmly established the general right of a struck employer to preserve his business by the hiring of replacements for strikers. Such right cannot be exercised in a discriminatory manner however. Labor Board v. Erie Resistor Corp., supra. The decision of the Board in the case at bar recognized the right of the struck employer, Food Jet, Inc., to replace and hence found it, but only it, not in violation of the Act. Although recognizing the right of Food Jet, Inc., to hire replacements under *Mackay* and the right of respondents to shut down in order to preserve the integrity of multi-employer bargaining under *Buffalo Linen* the Board reasons that respondents could have stayed operative with their regular employees and thus there was no economic necessity for replacements. The Board's decision states in such regard:

> "Locking out employees in order to replace them with other workers may hardly be viewed as equivalent to the defensive action of a shutdown to preserve the solidarity of the Association unit. On the contrary, since the Respondents were continuing to operate and since no reason appears why they could not have continued to operate with their own em-
> [fol. 71] ployees during the strike, this constitutes a temporary replacement of employees solely because they were engaging in protected concerted activity, i.e., striking against Food Jet."

We agree with the dissenting members of the Board that such view "renders largely illusory the right of lockout given them by the Supreme Court in Buffalo Linen."

The impact of the Board's decision is such that a denial of a basic right by indirection is inherent in it if unity of the multi-employer group is to be maintained. After the initiation of a whipsaw strike the struck employer may remain shut down, the other members of the group may lock out, and the unity of interest is thus maintained. But the struck employer is denied his right of replacement and the whipsaw tactic enjoys a privileged advantage. If, however, the struck employer does choose to operate with replacements and the other employers

cannot replace after lockout, the economic advantage passes to the struck member, the non-struck members are deterred in exercising the defensive lockout, and the whipsaw strike again enjoys an almost inescapable prospect of success. Such was not the intent of *Buffalo Linen*. To the contrary, *Buffalo Linen* recognizes that a lockout is justified in order to assure "the preservation of the in- [fol. 72] tegrity of the multi-employer bargaining unit." It is no answer to say that the respondents could have remained in operation through retaining their regular employees. This merely denies the privilege of lockout and, through denial, refuses any consideration of the existence of the overriding business purpose which, as recognized in Labor Board v. Erie Resistor Corp., supra, may justify the invasion of union rights. The preservation of the multi-employer bargain unit, approved as it is by congressional consideration and judicial decision,[4] is necessary to assure economic justice. It would be largely destroyed by leaving in the hands of the striking agency the power, by law, to determine which employers among the group could remain operative and which could not.

However, we do not understand *Buffalo Linen* to hold, and we do not hold, that a permissible lockout after the initiation of a whipsaw strike places the locked out employees in the absolute status of the actual strikers. Varying conditions premising the lockout, actual motives arising either before or after the lockout, or any number of possible factors may well bring particular cases within the area of the Board's primary responsibility of balancing legitimate interests by means of its expertise. We do hold that the Board has erred in its interpretation of [fol. 73] *Buffalo Linen*, that the acts of respondents in hiring replacements, presented as they are here against an uncluttered background, do not carry such indicia of intent as to warrant an inference of unlawful motive, that the order of the Board clearly fails to balance the legitimate interests of the parties and constitutes a prohibited determination by the Board of the economic weapons available to employers faced with a whipsaw strike.

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[4] See Mr. Justice Brennan's discussion in 353 U.S. 95, 96.

N.L.R.B. v. Insurance Agents Union, 361 U.S. 477, 80 S. Ct. 419, 4 L. Ed.2 454.

Enforcement is denied.

[fol. 74]

MURRAH, CHIEF JUDGE, DISSENTING.

I would enforce the Board's Order for the very reason which prompted the Supreme Court to enforce the Order in Buffalo Linen. In that case, the non-struck members of the employer unit temporarily locked out their employees, and shut down their operations. The Board, in our case, construed its decision in Buffalo as departing "from a long line of its precedents," to hold that the lock out was not an unfair labor practice, but a "legitimate defensive means of protecting the integrity of the multi-employer bargaining unit against the disintegration threatened by the whip-saw strike." The Supreme Court sustained the Board's Order, as a proper exercise of its administrative function to strike a balance between the conflicting legitimate interests of the two bargaining units. In doing so, the Court emphasized that the balancing of the conflicting interests at the bargaining table was "often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review."

In the process of balancing the conflicting interests, in our case, the Board found a "critical difference" between a defensive shut down, in Buffalo, and the lock out and continued operations with replacements, as here. It rea-

[fol. 75] soned that, in the context of our case, "locking out employees in order to replace them with other workers may hardly be viewed as equivalent to the defensive action of a shut down to preserve the solidarity of the association unit;" that "if the struck member operates through replacements, no economic necessity exists for the other members shutting down;" and, that a lock out and replacements, in these circumstances, may form the basis for an inference that such action was taken "not to protect the integrity of the employer unit, but for the purpose of inhibiting a lawful strike."

The Board was, indeed, sharply divided in its analysis and application of Buffalo to the facts of our case, and the consequent inference to be drawn from the respondent's conduct here. But, the majority view, nevertheless, prevails as the specialized judgment of the Board in its "spacious domain of policy," i.e., see: Phelps Dodge v. N.L.R.B., 313 U.S. 177, 194, cited and relied upon in Buffalo Linen. In these circumstances, it is not within the judicial prerogative to resolve the contrariety in the Board. It is sufficient, or limited judicial review, that the majority determinations of the Board are within the ambit of policy administration. Certainly, it is not within the judicial prerogative to say that a shut down is illusory, unless the employer is allowed to continue operations with replacements, for to me, the very statement, [fol. 76] on its face, involves the process of balancing conflicting interests at the bargaining table—a function which, as we have seen, is within the Board's exclusive province.

[fol. 77]

IN UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

* * * *

Before Honorable Alfred P. Murrah, Chief Judge, Honorable David T. Lewis and Honorable Jean S. Breitenstein, Circuit Judges.

JUDGMENT—June 17, 1963

This cause came on to be heard on the petition of the National Labor Relations Board for enforcement of its order and was argued by counsel.

On consideration whereof, it is hereby ordered that enforcement of the order of the National Labor Relations Board be and the same is hereby denied. Judge Murrah dissented.

[fol. 78]

[Clerk's Certificate to foregoing transcript omitted in printing.]

[fol. 79]

SUPREME COURT OF THE UNITED STATES

No. ——, October Term, 1963

[Title Omitted]

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—September 16, 1963

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 16, 1963.

/s/ Byron R. White
Associate Justice of the Supreme Court of the United States.

Dated this 16th day of September, 1963

[fol. 80]

SUPREME COURT OF THE UNITED STATES

No. 558, October Term, 1963

NATIONAL LABOR RELATIONS BOARD, PETITIONER

vs.

JOHN BROWN, ET AL.

ORDER ALLOWING CERTIORARI.—January 6, 1964.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1964 721271 709